

TERROR VERSUS TYRANNY

**An examination of the interface between
New Zealand's international counter-terrorism
and human rights obligations**

**by
Alex Conte**

LL.B. (Cant), LL.M. (Hons)(VUW)

Senior Lecturer in International Law, University of Canterbury, New Zealand

**A THESIS IN FULFILLMENT OF THE REQUIREMENTS FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY IN THE FACULTY OF LAW,
UNIVERSITY OF CANTERBURY**

JULY 2005

TERROR VERSUS TYRANNY

**An examination of the interface between
New Zealand's international counter-terrorism
and human rights obligations**

Alex Conte

Preface

In the wake of the September 11 attacks, it must be confessed that I was quite overwhelmed by the horrific events, by the loss of life, and by the sheer visual impact and magnitude of the attacks against the World Trade Centre and Pentagon. Overwhelmed but at the same time eager, not in any morbid sense, to learn more about terrorism. September 11 also created significant media and public interest. Having entered academia a year earlier, after some years in private practice, and as the only international lawyer at the University of Canterbury, I responded by writing on the subject. Soon enough, that research and writing led to this thesis.

As a full-time lecturer at the University of Canterbury, a part-time Barrister of the High Court of New Zealand, and a part-time PhD candidate, the progress and methodology in the writing of this thesis has been somewhat haphazard at times. The first two years of research were perhaps not typical of postgraduate research. That period of time was characterised by three types of activity: the collation of materials, from treaties to articles and cases; the writing of papers and articles on particular issues involved within the thesis topic; and the presentation of papers or other oral discussions and debate, including the giving of evidence to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill 2002.

In July 2004 I was fortunate enough to take up a research fellowship at the Centre for International and Public Law at the Australian National University, working with those involved in the Australian Research Council funded project on *Terrorism and the Non-State Actor*. With that work, this period was an opportunity to almost entirely dedicate time to the writing of the thesis proper. That period saw the further development of a number of ideas and the writing of four significant chapters and the near completion of a fifth chapter. Since returning to New Zealand from the fellowship in early December 2004, the preponderance of my time was again devoted to the writing and completion of the thesis. Thus it might be

said that a little over two years of research was sporadic and characterised by the research and consideration of isolated issues, while the balance of time consisted of a much more concentrated period of writing and review.

When first embarking upon this research, I was warned by colleagues that this would be akin to running a marathon, and it certainly has felt so at times. However, although the run has been a solo one, there are many I am grateful to for their roadside support. To my mother, for her unfailing faith, encouragement and pride. To my supervisors, Professor Chris Joyner at the Department of Government, Georgetown University, Washington DC, and Professors John Burrows and Scott Davidson at the School of Law, University of Canterbury, New Zealand. Professor Burrows' quiet, thoughtful, honest and generous oversight has meant a great deal to me, as did the generous input of Professor Davidson. I must likewise thank my colleagues, particularly those of the International Law Group at the University of Canterbury and the Centre for International and Public Law at the Australian National University, especially Dr Neil Boister, Professor Andrew Byrnes, John Caldwell, Associated Professor Pene Matthew, and Barbara von Tigerstrom.

Alex Conte

Table of Contents

<i>Preface</i>	i
<i>Table of Cases</i>	xii
<i>Table of Statutes and Treaties</i>	xx

1. Introduction	1
------------------------	----------

PART ONE: COUNTER-TERRORISM, HUMAN RIGHTS AND NEW ZEALAND

2. New Zealand's International Counter-Terrorist Obligations	10
2.1 International Terrorism	11
2.1.1 <i>Attempts to Define Terrorism</i>	12
2.1.2 <i>Why a Lack of Consensus?</i>	14
2.1.3 <i>The Concept of Terrorism</i>	20
2.2 International Conventions on Counter-Terrorism	24
2.2.1 <i>The Extant Conventions</i>	26
2.2.2 <i>Utility of the International Conventions</i>	33
2.2.3 <i>Draft Comprehensive Convention on International Terrorism</i>	33
2.2.4 <i>Customary International Law</i>	37
2.3 United Nations Action	38
2.3.1 <i>United Nations General Assembly</i>	38
2.3.2 <i>United Nations Security Council</i>	40
2.3.2(a) <i>Reports to the Counter-Terrorism Committee</i>	44
2.3.2(b) <i>"Terrorism"</i>	46
2.3.2(c) <i>Further obligations upon States?</i>	47
2.3.2(d) <i>Revitalisation of the Counter-Terrorism Committee</i>	51
2.4 New Zealand's Role in International Counter-Terrorism	52
2.4.1 <i>International Obligations</i>	53
2.4.2 <i>Terrorist Acts in the South Pacific</i>	54
2.4.3 <i>The Risk of Terrorism in the South Pacific</i>	55
2.4.4 <i>Supporting an International Framework on Counter-Terrorism</i>	57
2.5 Conclusion	59

3. New Zealand's Counter-Terrorist Legislation	62
PART A: IMPLEMENTATION OF COUNTER-TERRORIST OBLIGATIONS	
3.1 Modes of Implementation	63
3.2 Customary International Law	66
3.3 United Nations Action	68
3.3.1 <i>Resolutions of the Security Council</i>	68
3.3.1(a) <i>Non-binding reporting regime</i>	69
3.3.1(b) <i>Binding obligations</i>	70
3.3.1(c) <i>Non-binding directions</i>	76
3.3.2 <i>Resolutions of the General Assembly</i>	81
3.4 International Treaties	84
3.4.1 <i>Status of International Treaties in Domestic Law</i>	84
3.4.2 <i>Incorporation of International Treaties</i>	85
3.4.3 <i>Incorporation of the International Terrorism Treaties</i>	87
3.4.3(a) <i>Safety of aviation</i>	87
3.4.3(b) <i>Safety of persons</i>	88
3.4.3(c) <i>Maritime safety</i>	89
3.4.4 <i>Legislative Incorporation since September 11</i>	90
3.5 Summary: Transformation of New Zealand's International Terrorism Obligations	94
PART B: DOMESTIC INCORPORATING LEGISLATION	
3.6 Aviation Crimes Act 1972	97
3.7 Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980	101
3.8 International Terrorism (Emergency Powers) Act 1987	103
3.9 Maritime Crimes Act 1999	108
3.10 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and Amending Regulations	109
3.11 Terrorism Suppression Act 2002	111
3.11.1 <i>From Bill to the Current Act</i>	111
3.11.1(a) <i>Treaty implementation</i>	112
3.11.1(b) <i>Security Council Resolution 1373</i>	112
3.11.1(c) <i>Counter-Terrorism Act 2003</i>	113
3.11.1(d) <i>Terrorism Suppression Amendment Bill (No 2) 2004</i>	114
3.11.1(e) <i>Attorney-General's advice</i>	114
3.11.2 <i>Counter-Terrorist Framework under the Act</i>	115
3.11.2(a) <i>Definition of "terrorist act"</i>	116
3.11.2(b) <i>Offences</i>	119

Table of Contents

3.11.2(c)	<i>Designation of “terrorist entities”</i>	123
3.11.2(d)	<i>Forfeiture of terrorist property</i>	125
3.11.2(e)	<i>Financial transactions reporting</i>	126
3.11.3	<i>Review Mechanism</i>	129
3.11.4	<i>Potential Civil and Political Rights Issues</i>	131
3.12	Counter-Terrorism Act 2003	131
3.12.1	<i>Purposes of the Counter-Terrorism Act</i>	132
3.12.1(a)	<i>Treaty implementation</i>	132
3.12.1(b)	<i>Resolution obligations and investigative/ supplementary powers</i>	134
3.12.2	<i>Status of the Counter-Terrorism Act</i>	135
3.12.3	<i>Parts 1 and 3 of the Counter-Terrorism Act</i>	136
3.13	Other Legislation?	138
3.14	Potential Civil and Political Rights Issues	139
3.15	Conclusion	146
4.	Civil and Political Rights in New Zealand	149
4.1	New Zealand’s Civil and Political Rights Framework	150
4.1.1	<i>The International Human Rights Regime</i>	150
4.1.2	<i>Legislative Implementation of International Human Rights Obligations in New Zealand</i>	153
4.1.3	<i>The Human Rights Act 1993</i>	155
4.1.4	<i>The Privacy Act 1993</i>	156
4.1.5	<i>The New Zealand Bill of Rights Act 1990</i>	158
4.1.5(a)	<i>A Bill of Rights for New Zealand</i>	158
4.1.5(b)	<i>The affirmation of rights</i>	161
4.1.5(c)	<i>Application to the State</i>	162
4.1.5(d)	<i>The role of the Attorney-General</i>	163
4.2	Why Consider Human Rights in the Examination of Counter-Terrorist Legislation?	164
4.3	Application of the ICCPR and NZBORA	168
4.3.1	<i>The International Covenant on Civil and Political Rights</i>	168
4.3.2	<i>The New Zealand Bill of Rights Act</i>	171
4.3.2(a)	<i>The unholy trinity of sections 4, 5 and 6</i>	171
4.3.2(b)	<i>The meaning of the term “enactments”</i>	176
4.4	Limitations under the ICCPR and Domestic Law	183
4.4.1	<i>Limiting Rights under the International Covenant</i>	185
4.4.1(a)	<i>Non-derogable rights</i>	187
4.4.1(b)	<i>Notice of derogation(s)</i>	188
4.4.1(c)	<i>Public emergency</i>	188
4.4.1(d)	<i>Exceptional and temporary nature</i>	189
4.4.2	<i>Limiting Rights under the Bill of Rights Act and Human Rights Act</i>	189
4.4.2(a)	<i>Balancing methodology</i>	190

4.4.2(b)	<i>Onus and standard of proof</i>	191
4.4.2(c)	<i>Reasonable “limitation”</i>	192
4.4.2(d)	<i>The limitation must be “prescribed by law”</i>	194
4.4.2(e)	<i>The substantive test under section 5</i>	195
4.4.2(f)	<i>A summary on section 5</i>	199
4.5	Conclusion	201

PART TWO: THE INTERFACE BETWEEN COUNTER-TERRORISM AND HUMAN RIGHTS

5.	The Interface between Counter-Terrorism and Human Rights	204
5.1	The Impact of Terrorism on Security and Human Rights	206
5.1.1	<i>Security Council Resolutions</i>	207
5.1.2	<i>General Assembly and Commission on Human Rights Resolutions</i>	210
5.1.3	<i>An Overview of United Nations Observations</i>	214
5.2	Is Compliance with Human Rights Necessary?	219
5.2.1	<i>Security Council</i>	222
5.2.2	<i>General Assembly</i>	225
5.2.3	<i>Commission on Human Rights</i>	226
5.2.4	<i>Other International Bodies</i>	231
5.2.4(a)	<i>International Commission of Jurists</i>	231
5.2.4(b)	<i>Council of Europe</i>	233
5.2.4(c)	<i>Advisory Council of Jurists</i>	235
5.2.5	<i>Summary</i>	236
5.3	Counter-Terrorism and the ICCPR	237
5.3.1	<i>Terrorism and Emergency Measures</i>	237
5.3.2	<i>The Fiction of Non-Derogable Rights</i>	240
5.5	Counter-Terrorism and the NZBORA	246
5.4.1	<i>Preliminary Matters in the Application of Section 5</i>	247
5.4.2	<i>Application of the Substantive Test under Section 5</i>	249
5.4.3	<i>Proportionality</i>	252
5.4.3(a)	<i>Does the section 5 proportionality test fit with external guidelines on counter-terrorism and human rights?</i>	252
5.4.3(b)	<i>Factor 1: Measures rationally connected to the achievement of the objective</i>	254
5.4.3(c)	<i>Factor 2: Minimal impairment of the right</i>	256
5.4.3(d)	<i>Factor 3: Proportionality between the effects of the measures and the importance of the objective</i>	258
5.4.3(e)	<i>A summary on proportionality</i>	263

Table of Contents

5.5	The Interaction between Domestic and International Human Rights Obligations	265
5.5.1	<i>The Interaction between the ICCPR and NZBORA</i>	266
5.5.2	<i>'Valid' at Domestic Law but Contrary to the ICCPR</i>	269
5.5.2(a)	<i>The 'normal course' in finding a conflict</i>	269
5.5.2(b)	<i>The 'exceptional course' of rendering a conflict otherwise acceptable</i>	271
5.6	Counter-Terrorism and Privacy	275
5.7	Conclusion	278
6.	The United Nations Act 1946 and the Safeguarding of Human Rights in Executive Law-Making	282
6.1	The United Nations Act 1946	283
6.2	Regulation-Making Powers in New Zealand	285
6.2.1	<i>Limiting Enabling Provisions to Emergency Measures</i>	289
6.2.2	<i>Providing Additional Parliamentary Scrutiny</i>	291
6.2.3	<i>Regulations Abrogating Rights and Freedoms</i>	292
6.3	The Issue in Context: Counter-Terrorism versus Human Rights	294
6.3.1	<i>Suppressing the Financing of Terrorism</i>	294
6.3.2	<i>The Terrorism Regulations</i>	296
6.3.3	<i>Examining the Terrorism Regulations</i>	297
6.4	The Issue in Principle: How should the <i>United Nations Act</i> and <i>Bill of Rights Act</i> interact?	301
6.4.1	<i>Operative Provisions of the Bill of Rights Act</i>	302
6.4.2	<i>Applying Section 6 of the NZBORA</i>	302
6.4.3	<i>Applying Section 4 of the NZBORA to Section 2(2) of the UN Act</i>	303
6.4.4	<i>Conclusion?</i>	304
6.5	Recommendations	305
6.6	Conclusion	307
7.	Terrorist Designations and Rights to Justice	308
7.1	The Terrorist Designation Process	308
7.1.1	<i>The Making of Designations</i>	310
7.1.1(a)	<i>Interim versus final designations</i>	310
7.1.1(b)	<i>Expiry of designations</i>	311
7.1.1(c)	<i>Terrorist entities and associated entities</i>	315
7.1.1(d)	<i>Political consultation</i>	315
7.1.1(e)	<i>Material on which designations may be based</i>	316
7.1.1(f)	<i>Notice of designations</i>	317

Table of Contents

7.1.2	<i>Review of Designations</i>	319
7.1.2(a)	<i>Reviews initiated by a designated entity or interested party</i>	319
7.1.2(b)	<i>Government review of designations</i>	320
7.1.3	<i>Classified Security Information</i>	322
7.1.3(a)	<i>Proceedings for extension of designations</i>	324
7.1.3(b)	<i>Judicial review or other proceedings relating to designations</i>	325
7.1.3(c)	<i>The Supreme Court</i>	327
7.1.3(d)	<i>The trump card</i>	328
7.2	<i>The Designation Process and Natural Justice</i>	328
7.2.1	<i>The Issue of Natural Justice</i>	331
7.2.2	<i>Sources and Content of the Right to Natural Justice</i>	336
7.2.2(a)	<i>The International Covenant on Civil and Political Rights</i>	337
7.2.2(b)	<i>The New Zealand Bill of Rights Act 1990 and the Terrorism Suppression Act 2002</i>	341
7.2.3	<i>Preliminary Conclusion</i>	346
7.3	<i>The Designation Process as a Limitation upon Natural Justice</i>	347
7.3.1	<i>Limiting Natural Justice under the ICCPR</i>	347
7.3.2	<i>Limiting Natural Justice under the NZBORA</i>	348
7.3.2(a)	<i>The making of designations</i>	349
7.3.2(b)	<i>Notice of designations</i>	352
7.3.2(c)	<i>Review of designations by the Prime Minister</i>	353
7.3.2(d)	<i>Status of classified security information</i>	355
7.3.2(e)	<i>The Ahmed Zaoui case</i>	361
7.3.3	<i>The Clash Between the ICCPR and the NZBORA</i>	363
7.4	<i>Reform</i>	365
7.4.1	<i>Notice of Designations</i>	366
7.4.2	<i>Reinstatement of the Inspector-General's Review</i>	367
7.4.2(a)	<i>Review of designations</i>	368
7.4.2(b)	<i>Review of notifications</i>	369
7.4.2(c)	<i>Hearing of entities seeking reconsideration of designations</i>	370
7.4.3	<i>Panel of Security-Cleared Counsel</i>	373
7.5	<i>Conclusion</i>	377
8.	Democratic and Civil Rights	380
8.1	<i>Media Control</i>	380
8.1.1	<i>Freedom of the Press</i>	383
8.1.2	<i>Limiting the Freedom of Expression when Responding to Terrorism</i>	385
8.1.3	<i>Media Control and the ICCPR</i>	387
8.1.4	<i>Media Control and Judicial Review</i>	391
8.1.5	<i>Media Control and the NZBORA</i>	394
8.1.6	<i>Conclusion</i>	395

Table of Contents

8.2	Association with Terrorist Entities	396
8.2.1	<i>Freedom of Association</i>	397
8.2.2	<i>Association with Terrorist Entities and the ICCPR</i>	398
8.2.3	<i>Association with Terrorist Entities and the NZBORA</i>	399
8.3	Conclusion	401
9.	Criminal Procedure Rights and Search, Arrest and Detention Rights	403
9.1	The Privilege against Self-Incrimination	403
9.1.1	<i>The Meaning of section 198B of the Summary Proceedings Act</i>	406
9.1.2	<i>Section 198B and Human Rights</i>	408
9.1.3	<i>Self-Incrimination and the Common Law</i>	410
9.1.4	<i>Self-Incrimination, the NZBORA and the ICCPR</i>	414
9.1.4(a)	<i>Article 14(2) of the ICCPR</i>	414
9.1.4(b)	<i>Section 25 of the NZBORA</i>	415
9.1.4(c)	<i>Section 23 of the NZBORA</i>	416
9.1.4(d)	<i>Summary on section 198B of the SPA and section 23(4) of the NZBORA</i>	423
9.1.5	<i>Reform of section 198B of the Summary Proceedings Act</i>	425
9.1.6	<i>The Application of section 198B Beyond Counter-Terrorism</i>	428
9.2	Search and Seizure, and Arrest and Detention	432
9.2.1	<i>Defining the Rights and Freedoms</i>	433
9.2.1(a)	<i>Freedom from unreasonable search and seizure</i>	433
9.2.1(b)	<i>Freedom from arbitrary detention, and rights flowing from arrest or detention</i>	435
9.2.2	<i>Aviation Crimes Act 1972</i>	437
9.2.3	<i>Maritime Crimes Act 1999</i>	439
9.2.4	<i>International Terrorism (Emergency Powers) Act 1987</i>	441
9.2.5	<i>Summary</i>	444
9.3	Privacy and Surveillance	445
9.3.1	<i>International Terrorism (Emergency Powers) Act 1987</i>	446
9.3.2	<i>Crimes Act 1961</i>	447
9.3.3	<i>New Zealand Security Intelligence Service Act 1969</i>	448
9.3.4	<i>Telecommunications (Interception Capabilities) Act 2004</i>	450
9.3.5	<i>Tracking Devices</i>	450
9.3.5(a)	<i>The general regime authorising the use of tracking devices</i>	451
9.3.5(b)	<i>The use of tracking devices without a warrant</i>	542
9.3.5(c)	<i>Checks and balances</i>	453
9.3.5(d)	<i>Checks on the use of tracking devices under a warrant</i>	455
9.3.5(e)	<i>Checks on the use of tracking devices without a warrant</i>	456

Table of Contents

9.3.5(f)	Crown Law Office advice to the Attorney-General	457
9.3.5(g)	The use of tracking devices beyond counter-terrorism	458
9.4	Conclusion	458
10.	Conclusion	461
	Bibliography	477
BOOKS, ARTICLES AND PAPERS		
Books		
Articles		
Conference Papers		
UNITED NATIONS MATERIALS		
Commission on Human Rights		
General Assembly		
Human Rights Committee		
International Law Commission		
Security Council		
United Nations Secretariat		
OTHER INTERNATIONAL MATERIALS		
Advisory Council of Jurists		
European Union		
Organization for Economic Development and Cooperation		
Other Non-Governmental Organisations		
NEW ZEALAND MATERIALS		
Cabinet Office		
Controller and Auditor-General		
Crown Law Office		
Department of Justice		
Foreign Affairs, Defence and Trade Committee		
House of Representatives		
Human Rights Commission		
Law Commission		
Ministry of Foreign Affairs and Trade		
New Zealand Law Society		
Parliamentary Library		
Privacy Commission		
Regulations Review Committee		
Security Intelligence Service		
Submissions on Anti-Terrorist Legislation		
MATERIALS FROM OTHER JURISDICTIONS		
Fiji		
United Kingdom		
United States of America		
OTHER RESOURCES		
Press Releases		
Websites Cited in this Thesis		

Table of Cases

A

A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent), 16 December 2004, [2004] UKHL 56

A Newspaper Publishing Company v Trinidad and Tobago, Human Rights Committee Communication 360/1989

A Publication and a Printing Company v Trinidad and Tobago, Human Rights Committee Communication 361/1989

Agudo v Spain Human Rights Committee Communication 864/1999

Alabama Claims Arbitration (1872) Moore International Arbitrations 653

Ashby v Minister of Immigration [1981] 1 NZLR 222

Askoy v Turkey, ECHR, 18 December 1996

Asylum Case (Colombia v Peru) (1950) ICJ Reports 266

Attygale v R [1936] 2 All ER 116

Attorney-General v British Broadcasting Corp [1981] AC 303

Attorney-General v Zaoui (No 2) [2005] 1 NZLR 690

Attorney-General for Canada v Attorney-General for Ontario [1937] AC 326

Attorney General of Quebec v Quebec Association of Protestant School Boards [1984] 2 SCR 66

Auckland Area Health Board v Television New Zealand Ltd [1992] 3 NZLR 406

Auckland Unemployed Workers' Rights Centre Inc v Attorney-General [1994] 3 NZLR 720

B

B v Auckland District Law Society [2004] 1 NZLR 326

Black v Fulcher [1988] 1 NZLR 417

Brogan and Others v the United Kingdom, ECHR, 29/11/99

Bulk Gas Users Group v Attorney-General [1983] NZLR 129

Burrell v Jamaica, Human Rights Committee Communication 546/1993

C

Campbell v Robins [1959] NZLR 474

Chester v Bateson [1920] 1 KB 829

Chiarelli v Canada (Minister of Employment and Immigration)
(1992) 90 DLR (4th) 289

CREEDNZ v Governor General [1981] 1 NZLR 359

Curtis v Minister of Defence [2002] 2 NZLR 744

D

Daganayasi v Minister of Immigration [1980] 2 NZLR 130

Dalton v Police (1999) 5 HRNZ 415

Delgado Paez v Colombia, Human Rights Committee Communication
195/1985, views adopted 12/07/90

Director of Public Prosecutions v Lamb [1941] 2 KB 89

Drew v Attorney-General [2002] 1 NZLR 58

Dunlea v Attorney-General (2000) 3 NZLR 136

Duff v Comunicado Ltd [1996] 2 NZLR 89

F

Figueroa v Canada (Attorney General) [2003] 1 SCR 912

Fisheries Jurisdiction Case (United Kingdom v Iceland)
(1974) ICJ Reports 3

Flickenger v Crown Colony of Hong Kong [1991] 1 NZLR 439

Ford v Quebec (Attorney General) [1988] 2 SCR 712

Fraser v State Services Commission [1984] 1 NZLR 116

G

Genereux v R 1 SCR 259

Ghaidan v Mendoza [2004] 3 All ER 411

Governor of Pitcairn and Associated Islands v Sutton
[1995] 1 NZLR 426

H

Hart v Parole Board [1999] 3 NZLR 97

Hermoza v Peru, Human Rights Committee Communication 203/1986

Hopkinson v Police [2004] 3 NZLR 704

I

In the matter of R, unreported, 30/07/04, Kean J (HC), Auckland

Incal v Turkey, ECHR, 09/06/1998

Institute of Patent Agents v Lockwood [1894] AC 347

Ireland v the United Kingdom, ECHR, 18/01/78

Irwin Toy Ltd v Quebec (Attorney-General) (1989) 58 DLR (4th) 577

Island of Palmas Case, United Nations, 2 Reports of International
Arbitral Awards 829

J

Jansen-Gielen v The Netherlands Human Rights Committee
Communication 846/1999

K

Kim v Republic of Korea, Human Rights Committee
Communication 574/1994

KIS Films Inc v Vancouver (1992) CRR (2d) 98

Klass and Others v Germany, ECHR, 06/09/78

L

Laptsevic v Belarus, Human Rights Committee Communication 780/1997

Lavigne v Ontario Public Service Employees Union [1991] SCR 211

Lee v Macpherson (No 1) [1923] 2 QB 260

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1990), (1970-1971), Advisory Opinion of the International Court of Justice of 21 June 1971

Living Word Distributors v Human Rights Action Group
[2000] 3 NZLR 570

Lotus Case, Permanent Court of International Justice, Ser. A, no. 10, 28

M

MacKay v Rippon [1978] 1 FC 233

McEldowney v Forde [1971] AC 632

McFarlane v Sharp [1972] NZLR 838

Mabo v Queensland (1988) 166 CLR 186

Marine Steel v Government of the Marshall Island [1981] 2 NZLR 1

Martin v Tauranga District Court [1995] 2 NZLR 419

McKinney v University of Guelph [1990] 3 SCR 229

Minister of Home Affairs v Fisher [1980] AC 319

Ministry of Transport v Noort; Police v Curran [1992] 3 NZLR 260

Mockford v New Zealand Milk Board unreported, 14/10/81,
Roper J, HC Dunedin

Moonen v Film and Literature Board of Review [2000] 2 NZLR 9

Moonen v Film and Literature Board of Review (No 2) [2002] 2 NZLR 754

Mukong v Cameroon, Human Rights Committee Communication 458/1991

Munro v Auckland City [1967] NZLR 873

Murray v United Kingdom (1996) 22 EHRR 29

N

New Zealand Air Line Pilot's Association Incorporated v Attorney-General and Others [1997] 3 NZLR 269

New Zealand Drivers' Association v New Zealand Road Carriers [1982] 1 NZLR 374

New Zealand Waterside Workers Federation Industrial Association of Workers v Frazer [1924] NZLR 689

North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) (1969) ICJ Reports 3

O

Official Assignee v Chief Executive Officer of the Ministry of Fisheries [2002] 2 NZLR 722

Ontario Film and Video Appreciation Society [1984] 45 OR (2d) 80

P

Palmer v Superintendent Auckland Maximum Security Prison [1991] 3 NZLR 315

Park v Republic of Korea, Human Rights Committee Communication 628/1995

Pietrataroia v Uruguay, Human Rights Committee Communication r10.44/1979

Police v Hicks [1974] 1 NZLR 763

Potter v New Zealand Milk Board [1983] NZLR 620

R

R v B [1995] 2 NZLR 178

R v Barlow (1995) 2 HRNZ 635

R v Burns [2002] 1 NZLR 203

R v Chief Immigration Officer, Heathrow Airport, ex parte Salemat Bidi [1967] 1 WLR 979

R v Clarke [1985] 2 NZLR 212

- R v Edwards Books & Art Limited* [1986] 2 SCR 713
- R v Goodwin* [1993] 2 NZLR 153
- R v Goodwin (No 2)* [1992] 2 NZLR 390
- R v Grayson and Taylor* [1997] 1 NZLR 399
- R v Jeffries* [1994] 1 NZLR 290
- R v Lucas* [1998] 1 SCR 439
- R v McNicol* [1995] 1 NZLR 576
- R v Oakes* (1986) 26 DLR (4th) 200
- R v Phillips* [1991] 3 NZLR 175
- R v Pora* [2001] 2 NZLR 37
- R v Poumako* [2000] 2 NZLR 695
- R v Saifiti* [1994] 2 NZLR 403
- R v Schwartz* [1988] 2SCR 443
- R v Secretary of State for the Home Department; ex parte Tarrant*
[1985] 1 QB 251
- R v Therens* [1985] 1 SCR 613
- R v Thomsen* (1988) 63 CR (3d) 1
- R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*
[2002] WLR 1299
- Rameka et al v New Zealand, Human Rights Committee*
Communication 1090/2002
- Re A Reference re Public Service Employee Relations Act*
[1987] 1 SCR 313
- Re J (An Infant); B&B v DGSW* [1996] 2 NZLR 134
- Re "Penthouse (US)" Vol 19 No 5 and others*, 1 NZBORR 429
- Re Southam (No 1)* [1983] 41 OR (2d) 113
- Reef Shipping v The Ship "Fua Kavenga"* [1987] 1 NZLR 550

Rice v Connolly [1966] 2 All ER 649

S

Said v Norway Human Rights Committee Communication 767/1997

Silver v UK [1983] 5 EHRR 347

Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667

Solicitor-General v Radio New Zealand Ltd [1994] 1 NZLR 48

Sunday Times v United Kingdom (1978) 58 ILR 491

T

Taylor v New Zealand Poultry Board [1984] 1 NZLR 394

Te Heuheukino v Aotea District Maori Land Board
[1939] NZLR 107

Television New Zealand Ltd v Attorney-General [1995] 2 NZLR 641

Television New Zealand Ltd v Quinn [1996] 3 NZLR 23

The Wimbledon Case 2 International Law Reports 99

U

United Communist Party of Turkey and Others v Turkey, ECHR, 20/11/98

United Kingdom v Wellington Newspapers Ltd [1988] 1 NZLR 129

Upton v Green (No 2) (1996) 3 HRNZ 179

V

Van Gorkom v Attorney-General and Anor [1977] 1 NZLR 535

W

Waaka v Police [1987] 1 NZLR 754

Y

YL v Canada, Human Rights Committee Communication 547/1993

Z

Zana v Turkey, ECHR, 25/11/97

Zaoui v Attorney-General [2004] 2 NZLR 339

Table of Statutes and Treaties

NEW ZEALAND STATUTES AND REGULATIONS

Acts Interpretation Act 1924

Arms Act 1983

Aviation Crimes Act 1972

Border Security Bill, Bill 53-2 introduced to Parliament on 18 June 2003

Chemical Weapons (Prohibition) Act 1966

Children, Young Persons and Their Families Act 1989

Counter-Terrorism Act 2003

Crimes Act 1961

Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980

Criminal Justice Act 1985

Crown Proceedings Act 1950

Customs and Excise Act 1996

Customs Prohibition Order 1996

Dog Control Act 1996

Dog Control Amendment Act 2003

Extradition Act 1999

Films Videos and Publications Classification Act 1993

Financial Transactions Reporting Act 1996

Firearms Protocol to the United Nations Convention against Transnational Organized Crime (not yet in force)

Geneva Conventions Act 1958

Hazardous Substances and New Zealand Organisms Act 1996

Health and Disability Commissioner Act 1994

Human Rights Amendment Act 2001

Human Rights Commission Act 1977

Human Rights Commission Amendment Act 1992

Immigration Act 1987

Inspector-General of Intelligence and Security Act 1996

International Terrorism (Emergency Powers) Act 1987

Interpretation Act 1999

Judicature Act 1908

Law Practitioners Act 1982

Maritime Crimes Act 1999

Maritime Security Act 2004.

Misuse of Drugs Act 1976

Misuse of Drugs Amendments Act 1978

Mutual Assistance in Criminal Matters Act 1992

Narcotics Act 1965

New Zealand Bill of Rights Act 1990

New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987

New Zealand Security Intelligence Service Act 1969

New Zealand Security Intelligence Service Amendment Act 1977

Official Information Act 1982

Ombudsman Act 1975

Passports Act 1992

Police Complaints Authority Act 1988

Police Regulations 1992

Poultry Board Act 1980

Poultry Board Regulations 1980

Privacy Act 1993

Race Relations Act 1971

Regulations (Disallowance) Act 1989

Sentencing Act 2002

Summary Proceedings Act 1957

Summary Offences Act 1981

Supreme Court Act 2003

Telecommunications (Interception Capability) Act 2004

Terrorism Suppression Act 2004

Terrorism Suppression Amendment Bill (No 2) 2004

United Nations Act 1946

United Nations Sanctions (Afghanistan) Regulations 1999

United Nations Sanctions (Afghanistan) Regulations 2001

United Nations Sanctions (Afghanistan) Amendment Regulations 2001

United Nations Sanctions (Angola) Regulations 1993

United Nations Sanctions (Democratic Republic of the Congo) Regulations 2004

United Nations Sanctions (Eritrea and Ethiopia) Regulations 2000

United Nations Sanctions (Haiti) Regulations 1993

United Nations Sanctions (Iraq) Regulations 1991

United Nations (Iraq) Reconstruction Regulations 2003

United Nations Sanctions (Kimberley Process) Regulations 2004

United Nations Sanctions (Liberia) Regulations 1992

United Nations Sanctions (Libya) Regulations 1993

United Nations Sanctions (Rwanda) Regulations 1994

United Nations Sanctions (Sierra Leone) Regulations 1997

United Nations Sanctions (Somalia) Regulations 1992

United Nations Sanctions (Sudan) Regulations 2004

United Nations Sanctions (Yugoslavia) Regulations 1991

United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001

INTERNATIONAL AND REGIONAL CONVENTIONS AND PROTOCOLS

American Convention on Human Rights, 1144 UNTS 123 (entered into force 18 July 1978)

Charter of the United Nations 1946

Comprehensive Convention on International Terrorism (Draft)

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987)

Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953)

Convention for the Reciprocal Recognition of Proof Marks on Small Arms, opened for signature 1 July 1969, 795 UNTS 248 (entered into force 3 July 1971)

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973)

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992)

Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971)

Convention on Offences and Certain Other Acts Committed on Board Aircraft, opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969)

Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)

Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 9464 UNTS 211 (entered into force 4 January 1969)

Convention on the Marking of Plastic Explosives for the Purpose of Detection, opened for signature 1 March 1991, ICAO Doc 9571 (entered into force 21 June 1998)

Convention on the Non-Proliferation of Nuclear Weapons, opened for signature 1 July 1968, 729 UNTS 169 (entered into force 5 March 1970)

Convention on the Physical Protection of Nuclear Material, opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987)

Convention on the Prevention and Punishment of Crimes against International Protected Persons, including Diplomatic Agents, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977)

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, opened for signature 13 January 1993, CD/CW/WP.400/Rev.1 (entered into force 29 April 1997)

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, opened for signature 10 April 1972, 1015 UNTS 168 (entered into force 26 March 1975)

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 43 (entered into force 2 September 1990)

Convention on the Safety of United Nations and Associated Personnel, opened for signature 9 December 1994, 2051 UNTS 391 (entered into force 15 January 1999)

First Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976)

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 32 (entered into force 21 October 1950)

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950)

Geneva Convention for the Prevention and Punishment of Terrorism 1937 (Draft)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950)

Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 136 (entered into force 21 October 1950)

International Convention against the Taking of Hostages, opened for signature 18 December 1979, 1316 UNTS 205 (entered into force 3 June 1983)

International Convention for the Suppression of Terrorist Bombing, opened for signature 12 January 1998, 2149 UNTS 286 (entered into force 23 May 2001)

International Convention for the Suppression of the Financing of Terrorism, opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

Nasonini Declaration on Regional Security, Thirty-Third Pacific Islands Forum, Suva, Fiji Islands, 15-17 August 2002, Forum Communiqué, Annex 1

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978)

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 610 (entered into force 7 December 1978)

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992)

Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, opened for signature 24 February 1988, ICAO Doc 9518 (entered into force 6 August 1989)

Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002)

United Nations Act 1946

Universal Declaration of Human Rights, adopted by the United Nations in 1948 under United Nations General Assembly Resolution 217(III) of 10 December 1948

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)

Chapter 1

Introduction

Since the tragic events of September 11, 2001, the phenomenon of terrorism and the idea of a war against terrorism have been much publicised. A considerable number of issues arise when considering terrorism, particularly having regard to post-September 11 events. Primarily, those issues can be classified in three groups. First is the subject of the physical response to September 11, borne out through the intervention in Afghanistan under *Operation Enduring Freedom* and the generic “war against terror” – what might be looked at as matters concerning the use of force between States. Second are those issues involved in the prosecution, arrest and extradition of the perpetrators of terrorist acts – matters concerning international and transnational criminal law. Finally, and partly linked with the second set of issues, is the question of how to suppress and deal with terrorist acts – counter-terrorism.

The initial proposal for this thesis was to consider responses to terrorism by New Zealand and the United Nations post September 11. This thesis was to look at aspects of all three groupings of issues involved in the subject of terrorism. The final product is much different to that envisaged in March 2002. In order to properly contain the thesis subject, the topic has ever narrowed. Now, rather than considering the three groupings of issues, it is concerned with a particular aspect of the third set of issues (counter-terrorism). Specifically, the thesis examines New Zealand’s counter-terrorism obligations and the interface between those and its

international human rights obligations (including the domestic instruments through which those obligations have been implemented).

Thesis Overview

By looking at the international framework on counter-terrorism, it will be shown that counter-terrorism is considered to be a pressing objective in a free and democratic society – terrorism being something that negatively impacts on various rights and freedoms (the right to life being the most fundamental). Equally, however, both the international and domestic human rights frameworks take the position that the pursuit of such objectives must be undertaken in a proportionate and rational manner. Interesting issues arise in the particular analysis of apparent conflicts between New Zealand's counter-terrorist and human rights legislation. The overall thesis question is a simple one: *do the legislative means by which New Zealand has implemented its international counter-terrorism obligations comply with New Zealand's domestic human rights legislation and the International Covenant on Civil and Political Rights?*

The thesis is divided into two parts:

Part I: Counter-Terrorism, Human Rights and New Zealand

The first part of the thesis aims to lay a solid foundation for a more detailed examination of the interface between counter-terrorism and human rights by looking at extant international obligations and domestic law.

Chapter Two reviews the relevant international law sources of obligation pertaining to international terrorism. Some time is spent on the

question of the definition of terrorism, simply to introduce the notion that this is a term which creates difficulties (of relevance to Part II of the thesis when considering the terrorist designation process). Other than that, however, this is not a matter that requires resolution within the thesis, since New Zealand (like all States) has been required to adopt its own definition of the term, due to the lack of a defining clause within relevant conventions and United Nations resolutions. The chapter introduces the general nature of the twelve counter-terrorist treaties and the move to adopt a comprehensive convention. Resolutions of both the General Assembly and Security Council, as actual and potential sources of obligation, are also considered.

The next chapter, Chapter Three, reasonably mechanical in nature, looks at the twelve international conventions, various international resolutions and seven items of domestic legislation. The principal aim of the chapter is to identify the means by which New Zealand has implemented its international anti-terrorism obligations. In doing so, consideration is given to the nature of the international obligations and the consequent required means of incorporation. A chronological examination of each item of incorporating legislation is then undertaken, in an attempt to achieve three objectives. The first is to provide an overview of the nature and operation of the legislation. The second is to undertake an assessment of whether the legislation fully implements the relevant international obligations. Finally, consideration is given to what provisions of the legislation may have a *potential* impact on civil and political rights. The latter undertaking does not distinguish between primary and secondary

legislation, nor between policy, practice or discretion. It simply seeks to identify provisions that might impact upon a right or freedom (albeit that the impact may be subsequently “protected” by section 4 of the Bill of Rights Act 1990, or justified under section 5 of that Act). Those more detailed considerations are matters to be dealt with in later chapters, within Part II of the thesis.

Chapter Four, the final within Part I of the thesis, considers New Zealand’s human rights framework, including international obligations, pertaining to civil and political rights. It does so with the aim of establishing a sound platform for subsequent issues to be discussed within the second part of the thesis. The chapter considers, in brief terms, *why* the issue of human rights is raised in the context of counter-terrorism. It looks at both the International Covenant on Civil and Political Rights and the New Zealand Bill of Rights Act 1990. In doing so, the intention is to consider (in general, abstract, terms) how these two instruments apply to any examination of domestic law – considering the general review mechanisms of the ICCPR treaty-monitoring body and the manner in which New Zealand courts apply the NZBORA through the operative provisions of that Act. Of particular significance to this thesis, the chapter considers the question of how both instruments deal with the limitation of rights.

Part II: The Interface between Counter-Terrorism and Human Rights

Having looked at extant obligations and law, and identified potential areas of concern, Part II of the thesis undertakes a detailed examination of the interface between human rights and counter-terrorism.

Chapter Five establishes the principles by which this second part of the thesis is to examine particular provisions of New Zealand's counter-terrorist law and the interface of it with human rights. Acknowledging the obvious point that terrorism is an important objective to pursue, some consideration is given to resolutions of the United Nations on the subject which, cumulatively, recognise that terrorism has an adverse impact upon various aspects of international relations, the internal workings of a State and upon human rights. The question is then asked, *is compliance with human rights necessary when combating terrorism*, concluding that compliance is required and that various international bodies have recognised this point. The crux of the chapter, and of this thesis, is then reached. Considering that both the maintenance of human rights and the combating of terrorism are important objectives, how are those objectives to be accommodated in free and democratic societies? In the case of New Zealand, how is its counter-terrorist legislation to be measured against the human rights protections under the ICCPR and the NZBORA? This examination will bring to bear important and interesting issues: the interface between terrorism and emergency measures; the question of whether there is any such thing as 'non-derogable' or 'absolute' rights; how one is to measure the importance of the objective of counter-terrorism; how one is to assess whether any limitation upon rights effected by statutory counter-terrorist provisions is proportional; and the consequences of finding legislative provisions 'valid' under one human rights instrument but not the other.

Again focussing on a reasonably broad constitutional issue, Chapter Six considers the making of regulations under the United Nations Act 1946 and the potential for such regulations to limit rights in the pursuit of security issues. Although the making of regulations in response to Security Council Resolutions 1373 (concerning terrorism) is not found to cause any concern, it is discovered that the regulation-making power under the United Nations Act has the potential to abrogate rights. The balance between security and human rights is assessed, with recommendations for reform considered.

Chapter Seven is the first chapter to consider specific provisions of New Zealand's counter-terrorism legislation. It examines the process by which New Zealand can designate persons as 'terrorist' or 'associated' entities under the Terrorism Suppression Act 2002. Commencing with an expository overview of the designation process under the Act, the chapter identifies aspects of the process that raise concerns about the enjoyment of natural justice rights, in particular the disclosure of information and the giving of reasons for decisions. The chapter briefly traces the sources and content of the relevant aspects of the right to natural justice. Significantly, it then examines whether the tensions between the designation process and the right to natural justice are compatible with the ICCPR and the NZBORA. Concluding that the interface between the designation process and natural justice is not justifiable at international law, nor 'in principle' at domestic law, consideration is given to what reforms might render the process compatible with human rights through the implementation of proportionate limiting measures.

Chapter Eight considers two democratic and civil “freedoms”; the freedoms of expression and association. Concerning the freedom of expression, the ability of the Prime Minister to issue ‘media gags’ during times of an international terrorist emergency is examined. Brief consideration is given to the question of whether the freedom of expression includes freedom of the press. In the subsequent examination of the compatibility of the statutory provisions with the ICCPR and NZBORA, the question of the justiciability of such decisions is addressed, concluding that judicial review is available to determine whether media gags have been properly issued. That conclusion will be shown to significantly impact upon determining whether the limitations upon the freedom of the press are justifiable under the International Covenant and the Bill of Rights. Chapter 8 then considers the various restrictions upon the freedom of association imposed under the Terrorism Suppression Act 2002, which: prohibit the provision or collection of funds to or for a designated entity, or the provision of property or financial services to such entities; make it an offence to recruit another person into an organisation or group, knowing that the organisation or group is either a terrorist entity or participates in “terrorist acts”, or to participate in such an organisation or group; or, finally, criminalise the harbouring or concealing of a person, where it is known (or ought to be known) that the person has carried out, or intends to commit, a terrorist act.

The final chapter in which provisions of New Zealand’s counter-terrorist legislation are examined is Chapter Nine. The chapter is concerned with four of the seven items of New Zealand’s counter-terrorist

legislation: the Aviation Crimes Act 1972, the International Terrorism (Emergency Powers Act 1987), the Maritime Crimes Act 1999, and the Counter-Terrorism Act 2003. Those enactments contain provisions (potentially) impacting upon the privilege against self-incrimination, the freedom from unreasonable search and seizure, arrest and detention rights, and the freedom from interference with one's privacy. Chapter Nine examines each of those rights and freedoms in turn, applying the methodology identified under Chapter Five of the thesis.

Part One:
Counter-Terrorism, Human Rights
and New Zealand

Chapter 2

New Zealand's International Counter-Terrorist Obligations

International terrorism is not a new phenomenon. Indeed, the origin of the word *terrorism* dates back to the French Revolution of 1788 as the label used by the establishment to describe the conduct of revolutionaries.¹ Likewise, terrorism has been a subject of concern with the United Nations since the 1960s, following a series of aircraft hijackings.² Terrorism has, some would argue, entered a new phase since September 11 of 2001: an age where trans-national activity has intensified and been made easier, and where technology and the media can be taken advantage of by terrorist entities to further the impact of terrorist conduct and the delivery of messages or fear-inducing images.³

The responses and initiatives of the international community since September 11, in what has come to be known as the “war on terror”, have taken many varied forms.⁴ The subject of concern within this thesis, and this chapter in particular, is an assessment of New Zealand’s obligations under the international legal framework for counter-terrorism. This involves consideration of the various international treaties, norms of

¹ French Ambassador to Fiji, His Excellency Berg, “Terrorism: The New International Challenge”, presentation at the public workshop, *How Should Fiji Respond to the Threat of Terrorism?*, hosted by the Citizens’ Constitutional Forum and the Fiji Human Rights Commission, 17 July 2004, Suva, Fiji.

² Discussed below at 2.2 International Conventions on Counter-Terrorism.

³ Berg, above n 1.

⁴ Including, for example, the military intervention in Afghanistan under *Operation Enduring Freedom*, national security policies of pre-emptive strikes against States harbouring terrorists, initiatives towards strengthening measures towards disarmament and the non-proliferation of weapons of mass destruction and interdiction operations on the high seas.

customary international law and resolutions of the United Nations on the subject. By establishing the scope and content of this legal framework, and New Zealand's international obligations thereto, this thesis can then go on to consider the question of domestic implementation⁵ and its interface with human rights.⁶

2.1 International Terrorism

The starting point in looking at the international law on terrorism is to acknowledge the problems with defining terrorism. The United Nations Terrorism Prevention Branch⁷ describes terrorism as a unique form of crime. Terrorist acts, it says, often contain elements of warfare, politics and propaganda.⁸ It continues, stating that “[f]or security reasons and due to lack of popular support, terrorist organisations are usually small, making detection and infiltration difficult. Although the goals of terrorists are sometimes shared by wider constituencies, their methods are generally abhorred”.

One of the major obstacles facing the fight against terrorism is the inability of the international community to achieve consensus on a global definition of terrorism. The Executive Director of the International Policy

⁵ See Chapter Three, concerning counter-terrorism laws under New Zealand Acts of Parliament, and Chapter Six, concerning interim implementation of obligations by regulations made pursuant to the United Nations Act 1946.

⁶ See Part II of the thesis, Chapter Five in particular.

⁷ The Terrorism Suppression Branch is part of the United Nations Office on Drugs and Crime, which was established in 1997 (then with the name of the United Nations Office for Drug Control and Crime Prevention) as a special programme of the United Nations General Assembly as part of its programme of action against crime and towards drug control – see United Nations General Assembly Resolution 51/64 of 12 December 1996, A/RES/51/64, and 92/92 of 12 December 1997, A/RES/52/92.

⁸ United Nations Office on Drugs and Crime, “UN Action Against Terrorism”, URL <www.odccp.org/terrorism.html> at 19/06/02.

Institute for Counter-Terrorism, Boaz Ganor, has emphasised the point, saying that UN Security Council resolutions can only have an effective impact once all States agree upon what types of acts constitute terrorist acts.⁹ Despite this, there is still no definition of the term to which all States subscribe.

Generally speaking, the twelve international treaties on counter-terrorism¹⁰ deal with specific forms of terrorist conduct and are thereby precise in nature and not of general application. Furthermore, they are not a solution in themselves, since treaties are only binding upon States parties to treaties.¹¹ Nor does the United Nations Charter contain a definition of the term. Likewise, the Rome Statute of the International Criminal Court does not include terrorism as one of the international crimes within the Court's jurisdiction.¹² The Court has within its jurisdiction the "most serious international crimes", according to its preamble. It was proposed, within the draft Statute, to include terrorism within the Court's jurisdiction, but the failure of States to agree upon a definition of the term resulted in the crime being removed from the scope of the Court's jurisdiction and subject matter of the constitutive treaty.¹³

⁹ Ganor B, "Security Council Resolution 1269: What it Leaves Out", 25 October 1999, web site of the International Policy Institute for Counter-Terrorism, URL <www.ict.org.il/articles/articleDET.cfm?articleid=93> at 01/06/02.

¹⁰ Discussed in more detail below at 2.2 International Conventions on Counter-Terrorism.

¹¹ By application of the legal principle *pacta tertiis nec nocent nec prosunt* (treaties are not binding upon States unless their consent to be bound has been signified) – as reflected within article 34 of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

¹² Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

¹³ There are arguments, however, that terrorist acts fall within the jurisdiction of

Perhaps most surprising is the fact that Security Council Resolution 1373, which imposes various obligations concerning counter-terrorism upon member States of the United Nations, does not define the term.¹⁴

2.1.1 Attempts to Define Terrorism

Attempts to define the term have been made since before the establishment of the United Nations. The Draft League of Nations Convention for the Prevention and Punishment of Terrorism was to provide that terrorism comprised:¹⁵

All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.

This Draft Convention never came into force as not enough States ratified it, due to dissent over the definition.¹⁶

There have been suggestions that terrorism be defined as the peacetime equivalent of war crimes. In a report to the United Nations Office on Drugs and Crime (UNODC), Schmidt proposed taking the already agreed upon definition of war crimes (comprising deliberate attacks on civilians,

the Court as constituting crimes against humanity, as crimes under article 7 of the Rome Statute.

¹⁴ Having said this, the lack of definition was most likely due to the fact (as will be seen through subsequent discussions) that there is a lack of consensus on just what amounts to terrorism. In a desire to issue a forceful, and at the same time early, resolution in the wake of September 11 it is likely that the Council saw use of the term, without definition, as the only viable option in the short term. The problem with this approach is that it has left the question of defining the term with individual member States, leading to inconsistent definitions and, arguably, a weak rather than forceful resolution.

¹⁵ As recorded by the United Nations Office on Drugs and Crime on its website, "Definitions of Terrorism", URL <www.odccp.org/terrorism_definitions.html> at 19/06/02.

¹⁶ Geneva Convention for the Prevention and Punishment of Terrorism 1937 (Draft). See discussion on this point within the website of the United Nations Office on Drugs and Crime, "Definitions of Terrorism", URL <www.odccp.org/terrorism_definitions.html> at 19/06/02. See also Andreu-Guzmán, *Terrorism and Human Rights*, (International Commission of Jurists, 2002), 185.

hostage taking and the killing of prisoners) and extending it to peacetime.¹⁷ Terrorism would then have simply be defined as the “peacetime equivalents of war crimes”. It does not appear, however, that this has gained any popular acceptance. Schmidt’s earlier and more complex definition of terrorism is, on the other hand, cited by UNODC as representing “academic consensus”:¹⁸

An anxiety-inspiring method of repeated violent action, employed by a (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat and violence-based communication processes between terrorist (organisation), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on what the intimidation, coercion, or propaganda is primarily sought.

Although limited in its relevance to members of the European Union, the crime of terrorism has been defined by the Parliamentary Assembly of the Union as:¹⁹

Any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terrors among official authorities, certain individuals or groups in society, or the general public.

¹⁷ This definition was put to the United Nations Crime Branch by Schmidt in 1992: *ibid.*

¹⁸ *Ibid.* This definition comes from an earlier text: Schmidt AP and Jongman AI et al., *Political Terrorism* (Amsterdam and Transaction Books, 1988), 5.

¹⁹ Recommendation 1426 (1999) of the Parliamentary Assembly of the European Union, *European Democracies Facing up to Terrorism*, 23 September 1999, para 5. See also the much more precise definition within article 3(1) of the European Council Common Position of 27 December 2001.

What might be observed is that there are three common threads throughout this, and various other, definitions of “terrorism”: firstly, that the *physical* targets of a terrorist act are not the *intended* targets (the target against whom a message is being sent, usually a Government or International Organisation); next, that the purpose of the threat or violence is to intimidate and create a situation of fear or terror (hence the term *terrorism*) or to persuade or dissuade the primary target to do or abstain from doing something; and, finally, that this is done to advance an ideological, political, or religious cause.

It should be signalled at this stage that article 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism contains a description of prohibited conduct that might also be useful.²⁰ Ultimately, though, this is a description of a specific offence and applies only to States parties to that Convention.²¹

2.1.2 *Why a Lack of Consensus?*

The sticking point, it seems, is not so much with the technical wording of what physical conduct amounts to a terrorist act. The problem appears to lie with the purpose of the conduct. For instance, does a bombing carried out by a rebel group, which is directed towards the destabilisation of fascist authorities (the Pol Pot Regime, for example), amount to a terrorist act or an act of “freedom fighters”? The point to make is that this is not just a

²⁰ Opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

²¹ Discussed below at 2.2.2 *Utility of the International Conventions*.

cliché.²² To give two very striking examples, the United States keeps a list of the most wanted terrorists.²³ That list featured, at one time, Yassir Arafat and Nelson Mandela - both of whom were subsequently awarded the Nobel Peace Prize: clearly evidence that this is a highly political and controversial issue. An observation made by a journalist on this point encapsulates the issue very nicely:²⁴

Terrorists are those who use violence against the side that is using the word.

A number of States argue that a subjective analysis and definition of such conduct (by examining the purpose of the conduct) should therefore be made. It is interesting to note, in that regard, that early resolutions of the General Assembly addressing the issue of terrorism contained express affirmations of the principle of self-determination. In the very first resolution of the United Nations on the subject of terrorism, the General Assembly expressed deep concern over terrorism, urged States to solve the problem by addressing the underlying issues leading to terrorist conduct and then stated:²⁵

Reaffirms the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the

²² Indeed, this has been the subject of much debate. See, for example, Ganor B, "Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?", online publications of the International Policy Institute for Counter-Terrorism, URL <<http://www.ict.org.il/articles/define.htm>> at 7 January 2005.

²³ This is maintained by the United States Federal Bureau of Investigation and may be accessed online at URL <www.fbi.gov/mostwant/terrorists/fugitives.htm>.

²⁴ The Observer, 30 September 2001, quote contained within *Submissions of the Indonesian Human Rights Committee to the Foreign Affairs, Defence and Trade Committee on the Terrorism (Bombings and Finance) Suppression Bill*, TERRO/88, Parliamentary Library, Wellington.

²⁵ United Nations General Assembly Resolution 3034 (XXVII) of 18 December 1972, A/RES/27/3034, para 3.

purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations;

A number of subsequent General Assembly resolutions echoed this affirmation, adding that such liberation movements should also be conducted in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.²⁶ Although these resolutions urge compliance with these principles, the United Nations Office on Drugs and Crime reports that Arab States such as Libya, Syria and Iran have all campaigned for a definition that excludes acts of “freedom fighters” from the international definition of terrorism by employing the argument that a justified goal may be pursued by any available means.²⁷

While it must be acknowledged that these positions are firmly held by a small number of States, it should also be pointed out that the majority of States adhere to an objective definition of terrorism (one which does not take into account the motives of the conduct). In 1994, the UN General Assembly adopted the Declaration on Measures to Eliminate International

²⁶ This further qualification was first added by United Nations General Assembly Resolution 38/130 of 19 December 1983, A/RES/38/130, preambular para 6, and reiterated within United Nations General Assembly Resolutions 40/61 of 9 December 1985, A/RES/40/61, preambular para 8; 42/159 of 7 December 1987, A/RES/42/159, preambular para 12; 44/29 of 4 December 1989, A/RES/44/29, preambular para 17; and 46/51 of 9 December 1991, A/RES/46/51, preambular para 14. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States was adopted by the General Assembly in its Resolution 2625 (XXV) of 24 October 1970, A/RES/25/2625. Prior to this, the paragraph quoted was restated in United Nations General Assembly Resolutions 31/102 of 15 December 1976, A/RES/31/102, para 3; 32/147 of 16 December 1977, A/RES/32/147, para 3; 34/145 of 17 December 1979, preambular para 5; and 36/109 of 10 December 1981, preambular para 6. For a more detailed discussion on the issue of liberation movements and terrorism see Ganor B, “Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?”, online publications of the International Policy Institute for Counter-Terrorism, URL <<http://www.ict.org.il/articles/define.htm>> at 7 January 2005.

²⁷ United Nations Office on Drugs and Crime website, above, n 15.

Terrorism.²⁸ The Declaration was based on the notion of peace and security and the principle of refraining from the threat or use of force in international relations.²⁹ It pronounced that terrorism constitutes a grave violation of the purpose and principles of the United Nations.³⁰ While it did not purport to define “terrorism”, it did say that criminal acts intended or calculated to provoke a state of terror in the general public for political purposes are in any circumstances unjustifiable.³¹

The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardise the friendly relations among States and peoples and threaten the territorial integrity and security of States. [emphasis added]

In reaffirming the Declaration in 1995,³² the Assembly was even more precise on this point:³³

Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them; [emphasis added]

Of even greater value in this respect, according to the Executive Director of the International Policy Institute for Counter-Terrorism, is the Security

²⁸ United Nations General Assembly Resolution 49/60, *Measures to Eliminate International Terrorism*, A/RES/49/60, 9 December 1994.

²⁹ Ibid, as is evident through its preamble.

³⁰ Ibid, paragraph 2.

³¹ Ibid, paragraph 1.

³² United Nations General Assembly Resolution 50/53 of 11 December 1995, A/RES/50/53, para 3.

³³ Ibid, para 2. See also paras 2 of United Nations General Assembly Resolutions 51/210 of 17 December 1996, A/RES/51/210; 52/165 of 19 January 1998, A/RES/52/165; 54/110 of 2 February 2000, A/RES/54/110; 55/158 of 30 January 2001, A/RES/55/158; 56/88 of 24 January 2002, A/RES/56/88; 57/27 of 15 January 2003, A/RES/57/27; 58/81 of 8 January 2004, A/RES/58/81; and 59/46 of 2 December 2004, A/RES/59/46.

Council's Resolution 1269.³⁴ While the Resolution also fails to define terrorism, it does clearly take an objective approach to the question of terrorist conduct, stating that the Security Council:³⁵

1. *Unequivocally condemns* all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which would threaten international peace and security; [emphasis added]

Resolution 1373 also points to an objective approach, paragraph 3(g) of the Resolution calling upon States to ensure that “claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists”.³⁶ Even more directly on point is the latest resolution of the Security Council, as at the beginning of 2005, on the subject of terrorism:³⁷

3. *Recalls* that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature; [emphasis added]

³⁴ Ganor, above n 9.

³⁵ United Nations Security Council Resolution 1269 of 19 October 1999, S/RES/1269 (1999).

³⁶ United Nations Security Council Resolution 1373 of 28 September 2001, S/RES/1373 (2001).

³⁷ United Nations Security Council Resolution 1566 of 8 October 2004, S/RES/1566 (2004), para 3.

2.1.3 The Concept of Terrorism

One further matter bears reflection upon before leaving the issue of definition. The word “terrorism”, particularly in the vocabulary of the media since September 11, has come to be used as a description of a significantly wide range of violent conduct. Little regard is paid in use of the word to the three common threads identified above (differential targets; terror-inducing conduct; to influence a government or organisation). It has become all too common, in the observation of the author, for events with some level of “fear-factor” to be sensationalised as terrorist acts. Care must be taken when considering and assessing situations and how they might impact upon the topic. Civil conflicts where there is no differential targeting should be treated as civil conflicts, not as acts of terrorism. Criminal acts should likewise be dealt with in the context of normal criminal practice and procedure.

This opens the door to an even more fundamental question: *why talk about terrorism at all?* An act of “terrorism”, after all, will comprise a series of acts which, in and of themselves, constitute various criminal offences. To take an example, a bombing of an Embassy will likely involve the unlawful possession of explosives, the wilful destruction of property and the wilful injury to or killing of persons. Each element is a criminal offence in most jurisdictions and, as such, is capable of being dealt with by the relevant municipal jurisdiction. In submissions before the New Zealand Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill, for example, Professor Matthew Palmer argued that there are no good policy grounds to justify a separate, parallel regime

of counter-terrorism law.³⁸ Having regard to the composite nature of terrorist conduct, there is some merit to that argument.

The need to establish a separate regime must also be questioned having regard to the frequency and material affect of terrorist conduct. The annual publication of the United States Department of State, *Patterns of Global Terrorism*, has tracked the following patterns: 208 acts of international terrorism took place in 2003, up slightly from the 198 attacks in 2002, but down from the 355 attacks in 2001; with a corresponding death toll of 625 persons in 2003, 725 in 2002 and 3636 killed and injured in 2001.³⁹ In the twenty years up to September 11, the incidents of terrorist conduct fluctuated, without any discernable pattern, from the high 200s to the high 600s.⁴⁰ While one can never undervalue the loss of human life, it must be acknowledged that there are many more causes of death resulting in higher death tolls than as a result of terrorist conduct. If that is the case, then why add to the extant law?

³⁸ New Zealand, *Counter-Terrorism Bill. Government Bill. Commentary*, as reported from the Foreign Affairs, Defence and Trade Committee (2003) 2. See also Professor Palmer's article "Counter-Terrorism Law", (2002) *New Zealand Law Journal* 456.

³⁹ United States Department of State, *Patterns of Global Terrorism* 2001, May 2002, *Patterns of Global Terrorism* 2002, April 2003, *Patterns of Global Terrorism* 2003, April 2004 (Revised 22 June 2004). The New Zealand Law Commission report on emergencies likewise speaks of the perception of high death tolls resulting from terrorist activity, while at the same time recognising the broad psychological impact of terrorism upon society. In 1985, the report notes, 17 of the 28,000,000 US citizens who travelled abroad that year were killed by terrorists - equal to a one-in-1,600,000 chance of becoming a terrorist victim: Keith K, *Final Report on Emergencies* (New Zealand Law Commission Report 22, 1991), para 7.14.

⁴⁰ The 2001 Report, in reviewing patterns over a twenty-year period from 1981, also identifies that the least number of terrorist attacks, at 274, was recorded in 1998, with the highest number of incidents in 1987 at 666 attacks: *ibid*. It should be noted, of course, that a total of 3,030 people died during the September 11 attacks, as recorded in the remembrance pages of September 11 News.com, URL <<http://www.september11news.com/911Art.htm>> at 7 January 2004.

The answer seems to lie in a combination of factors, not all of which are unique to terrorism, but which cumulatively appear to have been seen by States as calling for a different treatment of the subject matter. The common thread in each factor, or at least in the way each factor can be perceived, is the political interests of States. The writer posits that at least the following factors are relevant to the move by the international community towards treating terrorism as a unique form of crime deserving special attention.⁴¹ The most apparent is the fear-inducing nature of terrorist conduct and the attention this brings to terrorist events through the media and public alike. This in turn adversely affects the credibility of national executive administrations in the eyes of the domestic public, and also the credibility of the United Nations as an institution established to maintain international peace and security in the eyes of the international community. The more severe the terrorist act, the greater the terror induced, to the extent that the public may in fact be paralysed in a real sense, affecting their freedom of movement and association, and enjoyment of life.⁴² That again serves to adversely impact upon national and international “executive” credibility. As will be seen through the

⁴¹ These are views posited in an attempt to illustrate *some* of the reasons that terrorism has been treated differently by the international community and constituting policy reasons (whether sound or not) for a separate or parallel counter-terrorism regime. Ultimately, however, this Chapter seeks to outline the international framework on counter-terrorism and is restricted in its consideration to that *existing* framework in order to deduce what consequent international obligations New Zealand has.

⁴² As explicitly recognised within United Nations General Assembly Resolution 54/164 of 24 February 2000, A/RES/54/164. The Resolution is very similar to its three predecessors: A/RES/49/185 of 23 December 1994; A/RES/50/186 of 22 December 1995; and A/RES/52/133 of 27 February 1998. Its contents were similarly reaffirmed within subsequent resolutions of the General Assembly: A/RES/56/160 of 13 February 2002; and A/RES/58/174 of 10 March 2004. See also Chapter Five, concerning the impact of terrorism upon human rights.

discussion of international documents on terrorism that follows, terrorism is therefore viewed as being a crime of “international concern” (using the wording of the Rome Statute on the International Criminal Court). Terrorism was, as already indicated, proposed to be included within the jurisdiction of the International Criminal Court, to stand beside genocide, war crimes and crimes against humanity.⁴³

A further issue of concern to States is the transnational nature of terrorist offending. Whether through Embassy bombings on foreign soil or direct attacks within the territory of a State (such as the September 11 attacks and the Madrid rail bombing), national interest and national security are affected. Through an international framework on counter-terrorism, those interests can be arguably better protected through the ability to secure the extradition of perpetrators of such attacks⁴⁴ and cut off the means by which terrorist organisations operate.⁴⁵

A final and individual self-interest of States is that of combating revolutionary and secessionist terrorism, that is, terrorism occurring solely within a State and aimed at destabilising or overthrowing the established government of the State, or conduct aimed at ‘breaking away’ from the State.⁴⁶ The established government has, in those circumstances, a very real and pressing desire to eradicate terrorism.⁴⁷ The international community, in seeking to maintain the integrity of statehood and the

⁴³ Above n 13.

⁴⁴ This being a common feature of the counter-terrorist conventions: see below.

⁴⁵ Whether by obliging States to prevent the use of their territories for training facilities or suppressing access to funds, explosives and the like.

⁴⁶ For more discussion on this point, see Ganor, above n 22.

⁴⁷ By way of example, India's Prevention of Terrorism Act 2002 describes a terrorist act as one including conduct by a person “with intent to threaten the unity, integrity, security or sovereignty of India” (section 3(1)(a) of the Act).

stability of regions, also has a vested interest. Examples include the Basque Fatherland and Liberty movement in Spain,⁴⁸ the Kurdistan Workers' Party in Turkey⁴⁹ and the Liberation Tigers of Tamil Eelam in Sri Lanka.⁵⁰ It should be noted that the classification of some such entities as terrorist organisations is disputed on the basis that these are freedom-fighting or liberation movements, illustrating the complex nature of defining terrorism and terrorist entities.

Although this philosophical question is important, hence it being raised and discussed, the ultimate policy reason for New Zealand enacting counter-terrorism legislation must be that it has international legal obligations to do so. The balance of this Chapter addresses the international framework upon which those obligations are based.

2.2 International Conventions on Counter-Terrorism

Following the September 11 attacks, the United Nations was quick to defend its position, stating that it has long been active in the fight against international terrorism.⁵¹ This is correct in substance, since the organisation has, from as early as 1963, been a catalyst for the creation of a number of agreements providing the basic legal means to counter international terrorism, from the seizure of the aircraft to the financing of terrorism.

⁴⁸ See Appendix A "Background Information on Designated Foreign Terrorist Organizations" in Howard RD and Sawyer RL (eds), *Terrorism and Counterterrorism. Understanding the New Security Environment (Revised and Updated)*, The McGraw-Hill Companies (2003), 507.

⁴⁹ Ibid, 514.

⁵⁰ Ibid, 516.

⁵¹ UN Press Release, 19 September 2001.

The phenomenon of terrorism became an international concern in the 1960s when a series of aircraft hijackings hit the headlines. When the 1972 Munich Olympic Games were disrupted the kidnapping of Israeli athletes by a Palestinian group, the then Secretary-General of the UN, Kurt Waldheim, asked that the issue be placed on the General Assembly's agenda. In the heated debate that followed, the Assembly assigned the issue to its Sixth (Legal) Committee, which subsequently proposed several conventions on terrorism. There are now twelve conventions and protocols on terrorism, all of which have entered into force.⁵² Those conventions and protocols are identified by the United Nations Counter-Terrorism Committee and Terrorism Prevention Branch as the principal international counter-terrorist treaties. If one were to take a more comprehensive approach, a considerably greater list of international treaties would be adopted.⁵³ In its first report to the Security Council Counter-Terrorism Committee, for example, New Zealand referred to its decision to ratify the United Nations Convention against Transnational Organized Crime and its

⁵² A situation that had not existed at the time of the September 11 terrorist attacks, as discussed below in the context of Security Council Resolution 1373 at 2.2.2 *Utility of the International Conventions*.

⁵³ Including, by way of illustration, the Convention on the Safety of United Nations and Associated Personnel (opened for signature 9 December 1994, 2051 UNTS 391, entered into force 15 January 1999), the Convention for the Reciprocal Recognition of Proof Marks on Small Arms (opened for signature 1 July 1969, 795 UNTS 248, entered into force 3 July 1971), the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (opened for signature 10 April 1972, 1015 UNTS 168, entered into force 26 March 1975), Convention on the Non-Proliferation of Nuclear Weapons (opened for signature 1 July 1968, 729 UNTS 169, entered into force 5 March 1970), and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (opened for signature 13 January 1993, CD/CW/WP.400/Rev.1, entered into force 29 April 1997). The Terrorism Prevention Branch itself identifies a list of *factors* that require action in the elimination of terrorism. The list of factors alone runs to seven pages – see “Classification of Counter-Terrorism Measures” URL <www.odccp.org/terrorism_measures.html> at 2 June 2002.

two Protocols against the Smuggling of Migrants and Trafficking in Persons.⁵⁴ For the purpose of this thesis, however, consideration will be confined to the twelve instruments identified by the Terrorism Prevention Branch, these being commonly identified as the principal anti-terrorism conventions.⁵⁵ Having said that, it might be noted within the subsequent description of extant conventions that a number of the offences created apply to anyone committing the offences described (such as the hijacking of an aircraft, for example), whether or not this is done in pursuit of terrorist motives.

2.2.1 *The Extant Conventions*

In chronological order, one starts with the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (the Tokyo Convention).⁵⁶ The Convention applies to acts affecting in-flight safety. It authorises the aircraft commander to impose reasonable measures, including restraint, on any person he or she believes has committed or is about to commit an act affecting in-flight safety, when necessary to protect the safety of the aircraft. It also requires contracting States to take custody of offenders and to return control of the aircraft to the lawful commander. The second and third conventions are also concerned with air safety. The

⁵⁴ New Zealand Government, *Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001*, lodged by New Zealand's Permanent Representative to the United Nations, Don McKay, 24 December 2001, S/2001/1269, 4.

⁵⁵ See, for example, the United Nations Treaty Collection list of "Conventions on Terrorism", URL <<http://untreaty.un.org/English/Terrorism.asp>> at 7 January 2004; and Greenwood C, "International Law and the 'War Against Terrorism'", *International Affairs* 78, 2 (2002) 301.

⁵⁶ Opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969). There are currently 178 States parties to the Convention, URL <<http://www.icao.int/icao/en/leb/Tokyo.htm>> at 5 January 2005.

Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention),⁵⁷ makes it an offence for any person on board an aircraft in flight to “unlawfully, by force or threat thereof, or any other form of intimidation, seize or exercise control of that aircraft” or to attempt to do so. It requires parties to the Convention to make hijackings punishable by severe penalties. It requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution and also requires parties to assist each other in connection with criminal proceedings brought under the Convention. The *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (the Montreal Convention)⁵⁸ makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft; to place an explosive device on an aircraft; and to attempt such acts or be an accomplice of a person who performs or attempts to perform such acts. As for the Seizure of Aircraft Convention just mentioned, it requires parties to make offences punishable by severe penalties and again requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution.

In 1973, the *Convention on the Prevention and Punishment of Crimes against International Protected Persons, including Diplomatic Agents* (the

⁵⁷ Opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971). There are currently 178 States parties to the Convention, URL <<http://www.icao.int/icao/en/leb/Hague.htm>> at 5 January 2005.

⁵⁸ Opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973). There are currently 180 States parties to the Convention, URL <<http://www.icao.int/icao/en/leb/Mtl71.htm>> at 5 January 2005.

Protected Persons Convention) was adopted.⁵⁹ Internationally protected persons are defined as a Head of State, a Minister for Foreign Affairs, a representative or official of a State or of an international organisation who is entitled to special protection from attack under international law (these people being popular terrorist targets). The Convention requires each State party to criminalise and make punishable by appropriate penalties which take into account their grave nature, the intentional murder, kidnapping, or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act constituting participation as an accomplice. Also within the theme of protecting persons, the *International Convention against the Taking of Hostages* (the Hostages Convention)⁶⁰ states that “any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a ... State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage” commits the offence of taking of hostage within the meaning of this Convention.

⁵⁹ Opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977). There are currently 146 States parties to the Convention, URL <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty7.asp> at 5 January 2005.

⁶⁰ Opened for signature 18 December 1979, 1316 UNTS 205 (entered into force 3 June 1983). There are currently 138 States parties to the Convention, URL <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty5.asp> at 5 January 2005.

Next in time is the *Convention on the Physical Protection of Nuclear Material* (the Nuclear Materials Convention).⁶¹ This criminalises the unlawful possession, use or transfer of nuclear material, the theft of nuclear material, and threats to use nuclear material (to cause death or serious injury to any person or substantial property damage).

The *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (the Montreal Protocol) was a further addition to air-safety-related counter-terrorist conventions.⁶² The Protocol extends the provisions of the Montreal Convention of 1971 to encompass terrorist acts at airports servicing international civil aviation.

The *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (the Rome Convention) was adopted in 1988.⁶³ Here, the treaty establishes a legal regime applicable to international maritime navigation that is similar to the regimes established concerning international aviation. More specifically, it makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships. As an optional protocol to the latter

⁶¹ Opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987). There are currently 109 States parties to the Convention, URL <http://www.iaea.org/Publications/Documents/Conventions/cppn_status.pdf> at 5 January 2005.

⁶² Opened for signature 24 February 1988, ICAO Doc 9518 (entered into force 6 August 1989). There are currently 148 States parties to the Protocol, URL <<http://www.icao.int/icao/en/leb/Via.htm>> at 5 January 2005.

⁶³ Opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992). There are currently 114 States parties to the Convention, URL <<http://www.imo.org/home.asp?flash=false>> at 5 January 2005.

Convention, the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (the Rome Protocol) was also adopted in 1988,⁶⁴ at the same time as its parent Convention. Again by way of extension, the Protocol establishes a legal regime applicable to fixed platforms on the continental shelf (similar to the regimes established with regard to international aviation).

Last in the list of conventions relating to air safety, and within the jurisdiction of the Secretary-General of the International Civil Aviation Organisation, is the *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (the Plastic Explosives Convention).⁶⁵ This is designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am 103 bombing). Parties are obligated in their respective territories to ensure effective control over “unmarked” plastic explosive, i.e., those that do not contain one of the detection agents described in the Technical Annex to the treaty. Each party must, among other things: take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; prevent the movement of unmarked plastic explosives into or out of its territory; ensure that all stocks of such unmarked explosives not held by the military or police are destroyed or consumed, marked, or rendered permanently ineffective within three years; take necessary measures to ensure that unmarked plastic explosives held by the military or

⁶⁴ Opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992). There are currently 103 States parties to the Protocol, URL <<http://www.imo.org/home.asp?flash=false>> at 5 January 2005.

⁶⁵ Opened for signature 1 March 1991, ICAO Doc 9571 (entered into force 21 June 1998). There are currently 113 States parties to the Convention, URL <<http://www.icao.int/icao/en/leb/MEX.htm>> at 5 January 2005.

police are destroyed or consumed, marked, or rendered permanently ineffective within fifteen years; and ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date of entry into force of the Convention for that State.

More recent in time is the *International Convention for the Suppression of Terrorist Bombing* (the Suppression of Bombing Convention).⁶⁶ As the name suggests, this creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction in a public place. Finally, there is the *International Convention for the Suppression of the Financing of Terrorism* (the Suppression of Financing Convention).⁶⁷ Of the 12 conventions, this is the most controversial. It requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social or cultural goals or which also engage in such illicit activities as drug trafficking or gun running. It commits States to hold those who finance terrorism criminally, civilly or administratively liable for such acts and provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy will no longer be justification for refusing to cooperate under the treaty.

⁶⁶ Opened for signature 12 January 1998, 2149 UNTS 286 (entered into force 23 May 2001). There are currently 123 States parties to the Convention, URL <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty9.asp> at 5 January 2005.

⁶⁷ Above n 20. There are currently 117 States parties to the Convention, URL <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp> at 5 January 2005.

In summary, then, the twelve anti-terrorism conventions are directed at the protection of potential terrorist targets or at the means through which terrorist organizations operate and do three main things: they criminalize certain conduct, they provide for the prosecution or extradition of perpetrators of such criminal acts, and they impose obligations upon States to suppress the conduct in question. Three potential target groups exist within the twelve conventions: civil aviation (the Tokyo, Hague and Montreal Conventions and the Montreal Protocol); persons (the Protected Persons Convention and the Hostages Convention); and operations at sea (the Rome Convention and Rome Protocol). Four means through which terrorist acts might be executed or facilitated are the subject matter of the remaining four conventions: the Plastic Explosives and Nuclear Materials Conventions and the Suppression of Bombing and Suppression of Financing Conventions.

2.2.2 Utility of the International Conventions

The number and scope of these conventions might, at first instance, seem impressive and comprehensive. They have, however, various limitations. To begin with, they only apply to States parties to the conventions. Even then, the conventions themselves are of limited application because of the very precise subject matter of each treaty. The conventions are not of general application but, rather, relate to specific situations in which terrorist acts might have effect, whether on board aircraft, in airports or on maritime platforms.

The only treaty with the potential to impact a wider audience and scope of activity is the Suppression of the Financing Convention. This is said for

two reasons. Firstly, the convention mirrors most of the suppression of financing obligations contained in Resolution 1373. As a resolution binding upon all members of the United Nations,⁶⁸ this has had a significant impact upon the status of the convention. Prior to September 11, 2001, there were just four states parties to the convention and, accordingly, the convention was not in force. Since then, and largely in response to UN Security Council Resolution 1373 and the work of the Counter-Terrorism Committee, almost 120 States have become parties to the convention, which has now come into force.⁶⁹

The other reason the Suppression of Financing Convention is of greater relevance is the fact that, in prohibiting the financing of terrorist entities or operations, it defines (for those purposes) what type of acts one may not finance.⁷⁰

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The Convention does therefore have some potentially wider application and is useful for States in determining the type of conduct they are to prohibit.

⁶⁸ By application of article 25 of the Charter of the United Nations.

⁶⁹ The convention came into force on 10 April 2002. There are now 132 signatories and 117 parties: URL <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp> at 12 July 2004.

⁷⁰ Article 2(1)(b) of the Suppression of Financing Convention.

2.2.3 Draft Comprehensive Convention on International Terrorism

Almost one year prior to the September 11 attacks, India had proposed that there be a comprehensive convention against terrorism, and there is much merit in this. Kofi Annan had called for an extensive coalition to combat terrorism and has predicted that such a campaign will be a long one and must involve all countries. Shortly after September 11, he followed in the steps of the Indian proposal and indicated that the General Assembly would take steps to complete a comprehensive antiterrorism treaty encompassing all current conventions.⁷¹

It has already been mentioned that the UN General Assembly adopted the Declaration on Measures to Eliminate International Terrorism in 1994.⁷² At the end of 1996, it established an Ad Hoc Committee, known as the Ad Hoc Committee Established by General Assembly Resolution 51/210.⁷³ The Committee was primarily tasked with work on conventions for the suppression of terrorist bombings and financing of terrorist operations and, thereafter, to address means of developing a comprehensive legal framework dealing with international terrorism.⁷⁴

India's Draft Comprehensive Convention on International Terrorism (2000) was subsequently referred to the Ad Hoc Committee. As yet, the convention has not been finalised and is likely to be some time away, if it is ever to become a reality. Due to the lack of unanimity on various issues,

⁷¹ United Nations Secretary-General's Report to the United Nations General Assembly, 56th General Assembly Meeting, GA/9914, 24 September 2001. For a more detailed discussion of the Draft Comprehensive Convention, see Andreu-Guzmán, *Terrorism and Human Rights*, (International Commission of Jurists, 2002), 202-210.

⁷² Above, page 13.

⁷³ Established under General Assembly Resolution 51/210 of 17 December 1996, A/RES/51/210.

⁷⁴ Ibid, paragraph 9.

and the range of issues involved, the Committee has concluded that finalizing a comprehensive international treaty on terrorism will depend primarily on agreement as to who would be entitled to exclusion from the treaty's scope, and on what grounds.⁷⁵ Otherwise, the majority of the 27 articles of the Draft Convention have been preliminarily agreed upon by the Committee.

One of the expected sticking points has been definitions, not just in terms of defining what amounts to a terrorist act (draft article 2), but also with regard to the wording of draft article 18, which concerns exemptions. In particular, the definition and/or inclusion of acts of "armed forces" or "parties" to a conflict (this being relevant to the proposed limited exemptions from jurisdiction and/or liability under the Convention); whether "foreign occupation" should be included within that category of exemptions; and whether the activities of military forces should be "governed" or "in conformity" with international law. Draft article 18 was described by the Chairman of the Committee as the crux of the convention.⁷⁶ Hinging upon these matters has been a lack of consensus on a preamble.

The draft Convention definition of terrorist acts is as follows (article 2):

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or

⁷⁵ Article 18 of the Draft Comprehensive Convention.

⁷⁶ Ad Hoc Committee Established by General Assembly Resolution 51/210, UN Press Release L/2993.

- (c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss,
when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.
- 2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of this article.
- 3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.
- 4. Any person also commits an offence if that person:
 - (a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of this article;
 - (b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of this article; or
 - (c) Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or
 - (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

The very real advantage of the definition proposed is that it *is* comprehensive in nature, rather than operational and limited to addressing particular types of terrorist acts,⁷⁷ or potential targets,⁷⁸ or potential means of furthering terrorist activities.⁷⁹ To give two examples, one of which poses real issues for agricultural States such as New Zealand, none of the twelve extant conventions prohibit or make it a crime to carry out acts of

⁷⁷ Aircraft hijacking, for example – see the Convention for the Suppression of Unlawful Seizure of Aircraft, above n 57.

⁷⁸ Diplomatic persons, for example – see the Convention on the Prevention and Punishment of Crimes against International Protected Persons, including Diplomatic Agents, above n 59.

⁷⁹ Through money laundering or the acquisition of plastic explosives, for example – see the International Convention for the Suppression of the Financing of Terrorism and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, above n 20 and 65.

cyber-terrorism or bioterrorism. In contrast, the definition contained within article 2(1)(c) of the Draft Comprehensive Convention could, depending on the scale of any “attack”, constitute a prohibited act under that instrument. It is therefore a great pity that scepticism surrounds the potential for the Draft Convention to become a reality.

2.2.4 Customary International Law Norms

It should finally be noted that international law on terrorism is not restricted to the twelve conventions listed. For example, the Geneva Conventions of 1949 (widely accepted as representing customary international law norms, and therefore binding upon all States) prohibit violence to life, in particular murder, mutilation, cruel treatment and torture, and the taking of hostages.⁸⁰ Customary international law normally has automatic force of law within domestic jurisdictions.⁸¹

By way of specific example, article 13(2) of the First Optional Protocol states that:⁸²

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

⁸⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 32 (entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 136 (entered into force 21 October 1950); and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950).

⁸¹ Discussed in more detail within Chapter Three, at 3.1 Modes of Implementation.

⁸² Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978).

2.3 United Nations Action

Beyond the work of the Sixth (Legal) Committee of the UN General Assembly in working towards the various counter-terrorism conventions discussed, both the General Assembly and Security Council have been working in concert on the issue of counter-terrorism. The extant resolutions and declarations of the UN will now be discussed.

2.3.1 United Nations General Assembly

In December 1994, the UN General Assembly adopted the Declaration on Measures to Eliminate International Terrorism.⁸³ The Declaration was based on the notion of peace and security and the principle of refraining from the threat or use of force in international relations.⁸⁴ It pronounced that terrorism constitutes a grave violation of the purpose and principles of the United Nations.⁸⁵ While it did not purport to define “terrorism”, it did say that criminal acts intended or calculated to provoke a state of terror in the general public for political purposes are in any circumstances unjustifiable.⁸⁶ The Declaration urged all States to consider, as a matter of priority, becoming party to the conventions on terrorism adopted up to that

⁸³ United Nations General Assembly Resolution 49/60 of 9 December 1994, A/RES/49/60. The Declaration has been restated and adopted in subsequent resolutions of the General Assembly, with the contents being much the same: see United Nations General Assembly Resolutions A/RES/50/53 of 11 December 1995; A/RES/51/210 of 17 December 1996; A/RES/52/165 of 19 January 1998; A/RES/54/110 of 2 February 2000; A/RES/55/158 of 30 January 2001; A/RES/56/88 of 24 January 2002; A/RES/57/27 of 15 January 2003; and A/RES/58/81 of 8 January 2004. Similar motives are also reflected within the Millennium Declaration of the General Assembly, United Nations General Assembly Resolution 55/2 of 8 September 2000, in which security and peace, as well as the strengthening of the United Nations, was said to be reliant, amongst other things, on States taking concerted action against international terrorism, and acceding as soon as possible to all the relevant international conventions.

⁸⁴ *Ibid*, as is evident through its Preamble.

⁸⁵ *Ibid*, paragraph 2.

⁸⁶ *Ibid*, paragraph 1.

time.⁸⁷ It called on States to refrain from organizing, instigating, assisting or participating in terrorist acts, and from acquiescing in or encouraging activities within their territories directed towards the commission of such acts.⁸⁸

In particular, States were directed that, in order to fulfil this obligation, they must refrain from facilitating terrorist activities. Paragraph 5(a) of the 1994 Declaration appears to indicate that a State must be proactive in doing so, obliging States to take appropriate practical measures to ensure that their territory is not used for terrorist installations or training camps, or for the preparation or organisation of terrorist acts. Paragraph 5(b) then refers to the obligation to apprehend and prosecute or extradite perpetrators of terrorist acts.

The practical observation to make is that, although compelling and strongly worded, this is a declaration of the General Assembly and therefore does not have the same weight as a convention, nor does it have signatories that are bound by its content. Indeed, article 10 of the UN Charter specifically provides that resolutions and declarations of the United Nations General Assembly are recommendatory only:

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

It is clear through reading minutes of General Assembly meetings immediately following September 11 that there were calls for the United

⁸⁷ Ibid, paragraph 6.

⁸⁸ Ibid, paragraph 4.

Nations to engage its full potential to identify and attempt to eradicate the roots of terrorism.⁸⁹ India's representative pointed out that integral to the efforts to end terrorism and prevent armed conflict is the need to deny to the perpetrators of such conduct access to arms and ammunition.⁹⁰ A first step towards this has been the adoption of a *Programme of Action by the United Nations Conference on the Illicit Trade in Small Arms*. Likewise, the General Assembly has given specific consideration to the issue of counter-terrorism within its very lengthy Resolution on *General and Complete Disarmament*.⁹¹ The General Assembly has also urged all States to become parties to the International Convention for the Suppression of the Financing of Terrorism.⁹² It recently issued a resolution concerned with strengthening international cooperation and technical assistance in promoting the implementation of the terrorism conventions and protocols within the framework of the activities of the UNODC Centre for International Crime Prevention.⁹³

2.3.2 United Nations Security Council

Just as the General Assembly has been long-acting in its consideration of and work against international terrorism, the Security Council has also

⁸⁹ See, for example, Ad Hoc Committee Established by General Assembly Resolution 51/210, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 on a Draft Comprehensive Convention on International Terrorism*, A/AC.252/2002/CPR.1 and Add.1, 1 February 2002.

⁹⁰ United Nations Press Release, "Poverty Reduction, Terrorism, Disarmament, Humanitarian Relief Discussed as General Assembly Continues Review of Secretary-General Report", from the 56th General Assembly Plenary Meeting, 25 September 2001, statement of Kamallesh Sharma, United Nations General Assembly representative for India.

⁹¹ United Nations General Assembly Resolution 56/24 of 29 November 2001, *General and Complete Disarmament*, A/RES/56/24, see Part T "Multilateral Cooperation in the Area of Disarmament and Non-Proliferation and Global Efforts Against Terrorism".

⁹² See United Nations General Assembly Resolution 54/109 of 9 December 1999, *International Convention for the Suppression of the Financing of Terrorism*, A/RES/54/109.

⁹³ United Nations General Assembly Resolution 58/136 of 22 December 2003, *Strengthening international cooperation and technical assistance in promoting the implementation of the universal conventions and protocols related to terrorism within the framework of the activities of the Centre for International Crime Prevention*, A/RES/58/136.

considered the issue for some time. The spate of aircraft hijackings saw the Council call on States to take all possible measures to prevent further hijackings or interference with international civil air travel.⁹⁴

On the day after the September 11 attacks, the United Nations Security Council adopted Resolution 1368, through which it unequivocally condemned the terrorist attacks and expressed that it regarded them as a threat to international peace and security.⁹⁵ It called on all States to urgently work together to bring to justice the perpetrators, organisers and sponsors of the terrorist attacks.⁹⁶ Security Council Resolution 1373 was later adopted, through which the UNSC determined that all States were to prevent and suppress the financing of terrorist acts, including the criminalisation of such financing and the freezing of funds and financial assets.⁹⁷ Described as one of the most strongly worded resolutions in the history of the Security Council⁹⁸, it also requires countries to cooperate on extradition matters and the sharing of information about terrorist networks.⁹⁹

⁹⁴ See, for example, United Nations Security Council Resolution 286 of 9 September 1970, S/RES/286 (1970).

⁹⁵ United Nations Security Council Resolution 1368, S/RES/1368, 12 September 2001.

⁹⁶ Ibid, paragraph 3.

⁹⁷ Above n 36.

⁹⁸ Richard Rowe, "Key Developments: Year of International Law in Review", A paper presented at the 10th Annual Meeting of the Australian & New Zealand Society of International Law, *New Challenges and New States: What Role for International Law?*, 15 June 2002, Australian National University, Canberra. Richard Rowe at that time worked in the International Organisations and Legal Division of the Australian Department of Foreign Affairs and Trade. He was the Australian representative and Vice-Chairman of the Ad Hoc Committee Established by General Assembly Resolution 51/210 during its Sixth Session, which followed the September 11 attacks.

⁹⁹ Above n 36, para 3.

As a decision made under Chapter VII of the United Nations Charter, compliance with Resolution 1373 is mandatory for UN members, imposing certain obligations upon those members.¹⁰⁰ Those obligations can be viewed in two parts. The first is the imposition of specific counter-terrorist obligations, as follows:

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

¹⁰⁰ Article 25 of the Charter of the United Nations.

- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
- (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

This set of obligations expands upon and significantly strengthens the Council's earlier Resolution 1269 of 1999.¹⁰¹ While Resolution 1269 considered steps to be taken by States to suppress terrorism, deny safe haven to terrorists and cooperate with others in the bringing to justice of perpetrators of terrorist conduct, the language of this earlier resolution is weaker for two principal reasons.¹⁰² First, paragraphs 1 and 2 of Resolution 1373 are considerably more specific in the steps to be taken in countering terrorism. Second, the instructive words of the more recent Resolution provide that "all States *shall*", whereas the earlier Resolution used a less forceful provision *calling upon* States to take *appropriate steps* to achieve the stated objectives. In short, then, Resolution 1373 takes a considerable step forward in the imposition of counter-terrorism obligations upon members of the United Nations.

Using such mandatory language is problematic, from a practical perspective, when one considers the specific instructions within paragraphs

¹⁰¹ Above n 35.

¹⁰² Para 4.

1 and 2. Some instructions may not be possible to comply with. Contrast, for example, paragraphs 2(d) and 2(f). Paragraph 2(f) requires UN member States to “afford one another the greatest measure of assistance” in the criminal investigation and prosecution of terrorists, while paragraph 2(d) requires States to “*prevent* those who finance, plan, facilitate or commit terrorist acts” from using their territories for those purposes. Compliance with paragraph 2(f), assistance in criminal investigations and prosecutions, is possible since it is a reactive activity (activity following a terrorist incident) and capable of measurement. This cannot be said in the case of compliance with paragraph 2(d), *prevention* of the financing, planning and commission of terrorist acts. All that can be done by a State is to undertake all *reasonable or practicable steps* to prevent such conduct, but a member State cannot ever truly guarantee that their territory *will not* be used for those purposes.

2.3.2(a) *Reports to the Counter-Terrorism Committee.* The second obligation under Resolution 1373 is a more general requirement to enter into what might be described as a reporting and monitoring dialogue between States and a special committee of the Security Council established under the Resolution, the Counter-Terrorism Committee. Paragraph 6 of the Resolution provides as follows:

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

Since Resolutions 1368 and 1373, there have been further resolutions of the Security Council dealing with the issue of international terrorism.¹⁰³ Recognizing the considerable burden upon States in the domestic implementation process following their party status to the 12 international conventions and in complying with Resolution 1373, the Council tasked the Counter-Terrorism Committee with exploring ways in which States could be assisted.¹⁰⁴ Resolution 1455 called upon UN member States to submit updated reports.¹⁰⁵ New Zealand has so far submitted four reports to the Committee under Resolutions 1373, 1455 and specific questions put to New Zealand by the Committee.¹⁰⁶ Those reports are considered further when discussing New Zealand's implementing legislation on counter-terrorism.¹⁰⁷

¹⁰³ Interestingly, though, the only resolution of the United Nations Security Council prior to September 11 and dealing with terrorism in the international context, rather than relating to and restricted to specific events, is Security Council Resolution 1189 of 13 August 1998, S/RES/1189 (1998). Although the resolution was adopted in response to the 1998 bombings in Nairobi, Kenya and Tanzania, it called upon all States "to adopt, in accordance with international law and as a matter of priority, effective and practical measures for security cooperation, for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators" (para 5).

¹⁰⁴ United Nations Security Council Resolution 1377 of 12 November 2001, S/RES/1377 (2001).

¹⁰⁵ United Nations Security Council Resolutions 1452 of 20 December 2002, S/RES/1452 (2002), and 1455 of 17 January 2003, S/RES/1455 (2003). The latter Resolution also concerns itself with further reporting by States to the Counter-Terrorism Committee.

¹⁰⁶ *Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001, New Zealand, 2 January 2002, S/2001/1269, Supplementary report providing additional information on the measures taken by New Zealand to implement the provisions of Security Council resolution 1373 (2001), 19 July 2002, S/2002/795, New Zealand response to the questions and comments of the Security Council Counter-Terrorism Committee contained in the Chairman's letter of 30 May 2003, 5 September 2003, S/2003/860, and New Zealand response to the United Nations Security Council Counter-Terrorism Committee questions for response by 30 April 2004, 7 May 2004, S/2004/359.*

¹⁰⁷ Chapter Three, in particular 3.3.1 Resolutions of the Security Council.

2.3.2(b) “*Terrorism*”. As already noted, there is no unanimously agreed-upon definition of the term terrorism, nor does Security Council Resolution 1373 define the term for the purpose of that resolution. Thus, in performing the various obligations pertaining to the suppression of terrorism under paragraphs 1 and 2 of the Resolution, States have been left to define the term themselves.¹⁰⁸ Other than “guidance” through the question and answer process with the Council’s Committee, States have had to determine the means by which obligations are to be imposed. Varying definitions of the term have consequently been adopted from one jurisdiction to another.¹⁰⁹

Of some assistance is the fact that the United Nations, through the Committee, has undertaken a process by which it designates individuals or organisations as terrorist entities based upon information provided to it. The process concludes with the adoption by the Security Council of a resolution confirming such designation and requiring all member States to likewise designate such entities. The process is not formalised in any way. The Council is simply required to apply the normal trigger test for the making of any resolution under Chapter VII of the United Nations Charter: the Council must be satisfied that a situation poses a threat to international peace and security, in which case it can take any of the measures provided for within articles 40 to 42 of the Charter (provisional measures, non-military sanctions, and enforcement measures). This topic is given further

¹⁰⁸ Confirmed in discussions with the then Deputy Director of the Legal Division to the New Zealand Ministry of Foreign Affairs and Trade, Mr Julian Ludbrook, on the event of the 10th Annual Meeting of the Australian & New Zealand Society of International Law, 15 June 2002, Canberra.

¹⁰⁹ A comprehensive comparison of definitions is not proposed, although some comparison is made (within Chapter Four) to definitions within Australia, the United States, United Kingdom and Canada.

consideration in the context of the impact of the designation process upon natural justice rights.¹¹⁰

2.3.2(c) *Further obligations upon States?* One further issue arises from the Security Council's Resolution 1373 and its later Resolution 1456.¹¹¹ Adopted in January 2003, Resolution 1456 calls upon the Counter-Terrorism Committee to intensify its efforts to promote the implementation of Resolution 1373, which is discussed further below.¹¹² It also contains the following provisions:

The Security Council therefore calls for the following steps to be taken:

1. All States must take urgent action to prevent and suppress all active and passive support to terrorism, and in particular comply fully with all relevant resolutions of the Security Council, in particular resolutions 1373 (2001), 1390 (2002) and 1455 (2003);
2. The Security Council calls upon States to:
 - (a) become a party, as a matter of urgency, to all relevant international conventions and protocols relating to terrorism, in particular the 1999 international convention for the suppression of the financing of terrorism and to support all international initiatives taken to that aim, and to make full use of the sources of assistance and guidance which are now becoming available;
 - (b) assist each other, to the maximum extent possible, in the prevention, investigation, prosecution and punishment of acts of terrorism, wherever they occur;
 - (c) cooperate closely to implement fully the sanctions against terrorists and their associates, in particular Al-Qaeda and the Taliban and their associates, as reflected in resolutions 1267 (1999), 1390 (2002) and 1455 (2003), to take urgent actions to deny them access to the financial resources they need to carry out their actions, and to cooperate fully with the Monitoring Group established pursuant to resolution 1363 (2001);

¹¹⁰ See Chapters Three (for discussion on the operation of the designation process under New Zealand legislation) and Seven (for discussion of the interface between this particular process and the right to natural justice).

¹¹¹ United Nations Security Council Resolution 1456 of 20 January 2003, S/RES/1456 (2003).

¹¹² See para 4.

The content of paragraph 1 and paragraphs 2(b) and 2(c), by themselves, do not cause any particular concern. Indeed, they are entirely consistent with earlier resolutions of the Council. It is paragraph 2(a), building upon paragraph 3(d) of Resolution 1373, that raises some issues about the proper role of the Security Council.¹¹³ By calling upon States to become party to all counter-terrorist conventions and protocols, is the Council over-stepping its function and impinging upon State sovereignty?

This is an interesting constitutional question that warrants at least some consideration. On the one hand, member States of the United Nations have to some degree surrendered their sovereignty by becoming a party to the United Nations Charter, to the extent that they have agreed to be bound by decisions of the Security Council.¹¹⁴ At the same time, however, it could hardly have been intended by those becoming party to the Charter to grant the Security Council the authority to direct members in their treaty-making decision processes. A considerable number of States have involved constitutional rules concerning the executive's treaty-making power which must be complied with before a State can ratify or accede to a treaty. Is the Security Council, by issuing the directions contained in paragraph 3(f) of Resolution 1373 and paragraph 2(a) of Resolution 1456, able to override such domestic constitutional safeguards?

Answering that question appears to lie in one further enquiry: whether any such resolution is indeed binding within the terms of article 25 of the

¹¹³ Note that this provision is reflected with resolutions of the General Assembly, although such resolutions are expressly not binding by virtue of article 10 of the Charter of the United Nations. See United Nations General Assembly Resolution 56/88 of 24 January 2002, A/RES/56/88, para 7; 57/27 of 15 January 2003, A/RES/57/27, para 7; 58/81 of 8 January 2004, A/RES/58/81, para 7; and 59/46 of 2 December 2004, A/RES/59/46, para 9.

¹¹⁴ Article 25 of the Charter of the United Nations.

Charter. There appear to be two bases upon which this second question might be answered. The first is to consider whether the resolution has been made within the mandate of the Security Council, since the various powers given to the Council, conferred under article 24, are so conferred to discharge its duties for the maintenance of international peace and security and for no other reason. Thus, if a resolution is not made for that purpose, the resolution would be made outside the authority of the Security Council and could not then be binding upon member States. In the context of the resolutions at hand, the subject matter concerns the suppression of terrorism which, as repeatedly stated by both the Security Council and General Assembly, is seen as one of the most serious threats to peace and security. Resolutions 1373 and 1456 were made, it is therefore concluded, within the proper authority of the Security Council.

The second consideration is whether the provisions at hand are “decisions” within the meaning of article 25 of the Charter, which provides that:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

The answer turns on whether exhortatory provisions constitute “decisions” within the meaning of article 25 and, in turn, whether the provisions at hand are exhortatory. This issue was considered by the International Court of Justice in the *Namibia Advisory Opinion*, where the Court took the position that a resolution couched in non-mandatory language should not

be taken as imposing a legal duty upon a member State.¹¹⁵ Turning to the paragraphs in issue, if the Security Council “calls upon States” to become party to counter-terrorism treaties, is this mandatory or exhortatory? The phrase is certainly not as forceful as “all States shall/must”, but it is at the same time more compelling than “requesting” or even “strongly encouraging” States to do so.¹¹⁶

Bearing in mind that the more forceful terms “shall” or “must” were not used (whereas they were used within other provisions of the resolutions) and that the provisions concern the treaty-making process (a matter that has always been regarded as within the sole purview of State executives), it is posited that a restrictive interpretation must be given to the provisions. The provisions must be seen as exhortatory and, following the *Namibia Advisory Opinion*, do not impose a legal duty upon States to become signatories to the various international counter-terrorism conventions.

In the case of New Zealand, this discussion is somewhat academic. Prior to September 11, New Zealand was party to eight of the twelve conventions, excluding the Convention on the Marking of Plastic Explosives for the Purpose of Detection,¹¹⁷ the Convention on the Physical Protection of Nuclear Material,¹¹⁸ the International Convention for the Suppression of Terrorist Bombing¹¹⁹ and the International Convention for

¹¹⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1990)*, (1970-1971), Advisory Opinion of the International Court of Justice of 21 June 1971, 53.

¹¹⁶ Both terms/phrases being commonly used in Security Council resolutions.

¹¹⁷ New Zealand had neither signed nor ratified the convention by this time.

¹¹⁸ New Zealand had neither signed nor ratified the convention by this time.

¹¹⁹ New Zealand had neither signed nor ratified the convention by this time.

the Suppression of the Financing of Terrorism.¹²⁰ New Zealand is now party to all twelve conventions and protocols. It is nevertheless an interesting point to note in the dynamics between the United Nations and its organs with members of the organisation. Whether New Zealand would have ratified all outstanding conventions, even absent the provisions of Resolution 1456, is moot – although its first report to the Counter-Terrorism Committee indicated that it had already intended to do so.¹²¹

2.3.2(d) Revitalisation of the Counter-Terrorism Committee. Notable terrorist events since September 11 have drawn the condemnation of the Security Council and prompting it to reiterate its earlier resolutions, including the bomb attacks in Bali, Indonesia on 12 October 2002;¹²² the taking of hostages in Moscow, the Russian Federation, on 23 October 2002;¹²³ the bombing of the Paradise Hotel in Kikambala, Kenya and the attempted missile attack on Arkia Israeli Airlines flight 582 departing Mombasa, Kenya (al-Qaida claiming responsibility for those acts);¹²⁴ and the bombing in Madrid, Spain on 11 March 2004.¹²⁵

¹²⁰ New Zealand had signed the convention on 7 September 2000, but not yet ratified.

¹²¹ *Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001, New Zealand*, 2 January 2002, S/2001/1269, 16. This report predates United Nations Security Council Resolution 1456 by approximately twelve months.

¹²² United Nations Security Council Resolution 1438 of 14 October 2002, S/RES/1438 (2002).

¹²³ United Nations Security Council Resolution 1440 of 24 October 2002, S/RES/1440 (2002).

¹²⁴ United Nations Security Council Resolution 1450 of 13 December 2002, S/RES/1450 (2002).

¹²⁵ United Nations Security Council Resolution 1530 of 11 March 2004, S/RES/1530 (2004). The Resolution records the ETA as having perpetrated the bombing, on advice of the Spanish Government to this effect: see para 1. It has subsequently been established that the bombing was undertaken by a mixture of Spanish, Moroccan and Syrian nationals with suspected links to al-Qaida: see, for example, 'Madrid Bombing Suspects', BBC News UK Edition, URL

With these events in mind, the Counter-Terrorism Committee (CTC) has undergone revitalisation under Security Council Resolution 1535.¹²⁶ The Committee's reform has been implemented to give it further means to fulfil its mandate of monitoring the implementation of Resolution 1373. The Committee now consists of two main organs. The first, the "Plenary", is composed of the Security Council member States and acts to monitor the second part of the Committee and provide it with policy guidance. The functional part of the Committee is the "Bureau" composed of the Chair and Vice-Chairs of the Security Council and a renamed "Counter-Terrorism Committee Executive Directorate" (which comprises, in real terms, those members of the CTC that had worked in the Committee up to its restructuring).¹²⁷

2.4 New Zealand's Role in International Counter-Terrorism

A view often repeated in submissions to the New Zealand Foreign Affairs, Defence and Trade Committee on the Terrorism Suppression Bill was that

<<http://news.bbc.co.uk/1/hi/world/europe/3560603.stm>> at 12 March 2005. The ETA, *Ezukadi Ta Askatasuna* (roughly translated as "Basque Fatherland and Liberty") was founded in 1959 with the aim of establishing an independent homeland in the northern Spanish provinces based on Marxist principles and operating primarily in the Basque autonomous regions of northern Spain and south-western France: see Appendix A "Background Information on Designated Foreign Terrorist Organizations" in Howard RD and Sawyer RL (eds), *Terrorism and Counterterrorism. Understanding the New Security Environment (Revised and Updated)*, The McGraw-Hill Companies (2003), 507.

¹²⁶ United Nations Security Council Resolution 1535 of 26 March 2004, S/RES/1536 (2004). It should be noted, however, that the proposal to revitalise the Committee pre-dated the Madrid Bombing: see United Nations Information Service, "Security Council Considers Proposal to Revitalize Counter-Terrorism Committee", 5 March 2004, SC/8020. Interestingly, the Council was briefed on the work of the Counter-Terrorism Committee by the CTC's Chairman, Inocencio Arias, Permanent Representative of Spain to the United Nations.

¹²⁷ A very useful web site has been established by the Counter-Terrorism Committee, explaining the mandate, practices and assistance programme of the Committee and containing State reports to the Committee and other useful documents and papers: see URL <<http://www.un.org/Docs/sc/committees/1373>>.

there was no need for New Zealand to adopt counter-terrorist legislation. From a regional perspective, Pacific Island States¹²⁸ have not been subject to, or had to deal directly with, international terrorism – other than the bombing by French military agents of the *Rainbow Warrior* in New Zealand in 1985.

2.4.1 International Obligations

One of the most simple reasons for the relevance of, and need for, counter-terrorist action in New Zealand is that such action is an obligation at international law. The conventions, protocols and resolutions discussed within this chapter form the basis of obligations at international law which must be implemented by New Zealand into domestic legislation (at least to the extent necessary to comply with those obligations).

It is also relevant to note that at the thirty-third Pacific Island Forum in Fiji, New Zealand being a member of the Forum, Forum Leaders adopted the Nasonini Declaration on Regional Security.¹²⁹ The Declaration underlined the commitment of Forum Leaders to the implementation of internationally agreed anti-terrorism measures, with express reference to Resolution 1373, and tasked the Forum Regional Security Committee to review the regional implementation of the Resolution.¹³⁰

¹²⁸ For the purpose of this chapter, Pacific Island States are limited to those members of the Pacific Forum, being: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand (incorporating the non-self governing territory of Tokelau), Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu. This excludes French Polynesian States and American Samoa, being States that are governed by France and the United States respectively.

¹²⁹ Thirty-Third Pacific Islands Forum, Suva, Fiji Islands, 15-17 August 2002, Forum Communiqué, Annex 1, 'Nasonini Declaration on Regional Security'.

¹³⁰ Ibid, paras 5 and 9.

2.4.2 Terrorist Acts in the South Pacific

Having said that the *Rainbow Warrior* bombing was the only incident of international terrorism within the South Pacific, it should be recognized that this statement is dependent on what definition of terrorism is adopted. Certainly, it is the only *international* terrorist act occurring within the Pacific. On 10 July 1985, French military agents Mafart and Prier bombed and sank the Greenpeace flag-ship the *Rainbow Warrior* in the Auckland harbour port, resulting in the death of a Greenpeace activist on board the vessel. The bombing took place just days before the *Rainbow Warrior* was to undertake a protest voyage to the French nuclear test site at Moruroa Atoll.¹³¹

Simpson, however, points to various *internal* acts of terrorism within the Pacific.¹³² In New Caledonia in the 1980s, the Kanak Socialist National Liberation Front (FLNKS) was denounced as a separatist terrorist movement.¹³³ It subsequently formed part of the coalition government in 2001 and is now the main opposition party in New Caledonia.¹³⁴ The Fiji

¹³¹ Greenpeace, 'The Bombing of the Warrior', URL <<http://archive.greenpeace.org/comms/rw/pkbomb.html>> at 16 September 2004. Mention might also be made to other incidents (which may, or may not, be considered to amount to terrorist acts, depending on the definition adopted) within New Zealand. For example, on 18 November 1982, Neil Roberts carried and exploded a gelignite bomb in the entrance to the Wanganui police computer, said to have been perpetrated to advance his anarchist beliefs: see <<http://cw178.tripod.com/neill.htm>> at 6 July 2005. Two years later, there was a bomb attack at the Wellington Trade Union Centre, in which one person was killed: see *Submissions of the Socialist Workers' Organisation to the Foreign Affairs, Defence and Trade Committee on the Terrorism Suppression Bill* at URL <www.converge.org.nz> at 6 July 2005.

¹³² Simpson S, "A Brief History of Terrorism in the South Pacific", presentation at the public workshop, *How Should Fiji Respond to the Threat of Terrorism?*, hosted by the Citizens' Constitutional Forum and the Fiji Human Rights Commission, 17 July 2004, Suva, Fiji.

¹³³ Ibid.

¹³⁴ Electionworld.org, 'Elections in New Caledonia', URL <<http://www.electionworld.org/newcaledonia.htm>> at 16 September 2004.

coups of 1987 and 2000 have likewise been classified as terrorist events,¹³⁵ although they might more properly be categorized as internal civil conflicts.¹³⁶ The “civil conflict” in the Solomon Islands during 2000, in contrast, has been said to include terrorist conduct on the part of both main factions, the Malaita Eagles Force and the Isatabu Freedom Movement.¹³⁷

2.4.3 *The Risk of Terrorism in the South Pacific*

As already noted, there is a common view that the likelihood of terrorist acts being perpetrated within the Pacific is remote, such that counter-terrorism should remain at the low-end of priorities for the region. While this risk assessment might well be correct, there are various factors that count in favour of a more proactive approach, from even a purely self-serving perspective. As evident from the foregoing discussion, the South Pacific has been subject to terrorist incidents in the past, however defined. Regard should also be had to the possibility and consequences of a direct attack. Of particular relevance to a number of Pacific Island States, as States reliant upon the export of commodities such as dairy, meat and fruit,¹³⁸ is the bio security of those States. This is a matter dealt with primarily under the domestic legislation of each State including, for

¹³⁵ Simpson, above n 133.

¹³⁶ See the discussion above concerning the misuse of the term “terrorism” in the absence of differential targeting and fear-inducing conduct.

¹³⁷ Simpson, above n 133.

¹³⁸ By way of example, Statistics New Zealand identifies exports for the years ended June 2001, 2002 and 2003 to be as follows: milk powder, butter and cheese at \$(million) 5,790 (2001), 5,891 (2002) and 4,679 (2003); meat and edible offal at \$(million) 4,182 (2001), 4,429 (2002) and 4,112 (2003); logs, wood and wood article at \$(million) 2,192 (2001), 2,378 (2002) and 2,386 (2003); fish, crustaceans and molluscs at \$(million) 1,374 (2001), 1,402 (2002) and 1,032 (2003); and fruit at \$(million) 1,045 (2001), 1,159 (2002) and 1,032 (2003); see Statistics New Zealand online information ‘Quick Facts – Economy’, URL <<http://www.stats.govt.nz/domino/external/web/nzstories.nsf/htmldocs/Quick+Facts+-+Economy>> at 17 September 2004.

example, the Biosecurity Act 1993 in New Zealand. Bioterrorism might, as discussed above, fall within the global definition of terrorism under article 2(1)(c) of the Draft Comprehensive Convention on International Terrorism.¹³⁹ New Zealand recently took steps towards including bioterrorism as an offence under its domestic law, effected through the Counter-Terrorism Act 2003.¹⁴⁰

Despite its geographical isolation, the reality of the contemporary world is that globalisation has dissolved distances that may have once protected the Pacific Islands. Transport and communications systems, access to the internet, and more efficient means of moving people and money, mean that it is easier for the world to interact with the Pacific.¹⁴¹ Individuals thought to be connected with al-Qaeda have been reported to have been present in New Zealand, Australia and Fiji.¹⁴² Pacific Forum Secretary General, Greg Urwin, adds that while terrorists may not seek to attack citizens and institutions of Pacific countries, the region might prove to be a tempting target, either for an attack like the one in Bali in October 2002, or as a base or staging point from which terrorist cells might undertake planning for an attack elsewhere.¹⁴³ The New Zealand Security

¹³⁹ On that subject, however, see (as a starting point) Hoffman RE, "Preparing for a Bioterrorist Attack: Legal and Administrative Strategies", 9(2) (2003) *Emerging Infectious Diseases* 241.

¹⁴⁰ Section 6 of the Act amended the Crimes Act 1961 to include new sections 298A and 298B, making it an offence to contaminate food, crops, water or other products.

¹⁴¹ Urwin G, "The Need for Anti-Terrorism Legislation in Fiji", presentation at the public workshop, *How Should Fiji Respond to the Threat of Terrorism?*, hosted by the Citizens' Constitutional Forum and the Fiji Human Rights Commission, 17 July 2004, Suva, Fiji, para 8.

¹⁴² Ibid, para 9. Anecdotal reports are that one of the September 11 hijackers spent a considerable time living in Fiji up until six months prior to the World Trade Centre attacks.

¹⁴³ Ibid, para 10.

Intelligence Service recently reported, for example, that Islamic extremists with links to international terrorist organizations are likely to be operating in New Zealand:¹⁴⁴

From the Service's own investigations we assess that there are individuals in or from New Zealand who support Islamic extremist causes. The Service views these developments, most of which have come to attention within 2003/04, with considerable concern. They indicate attempts to use New Zealand as a safe haven from which activities of security concern elsewhere can be facilitated and/or the involvement of people from New Zealand in such activities.

2.4.4 Supporting an International Framework on Counter-Terrorism

One of the most important points to make in this chapter is a relatively simple one, although the consequences of it are wide-ranging. The international conventions and protocols, reinforced by customary law and resolutions of the General Assembly, and added to by Security Council resolutions, create an *international* framework for counter-terrorism. A considerable measure of their effectiveness lies in the universal adoption and implementation of the obligations under that framework in order to prevent *any* State being either targeted by terrorists or used by them as a base of operations (whether that be the establishment of physical training camps or the laundering of money to fund activities of terrorist organisations).

Following the train bombing in Madrid on 11 March 2004, in which nearly 200 people were killed, Spain's Ambassador to the United Nations (who also chairs the Security Council Counter-Terrorism Committee)

¹⁴⁴ New Zealand Security Intelligence Service, *Report to the House of Representatives for the year ended 30 June 2004*, presented to the House of Representatives pursuant to section 4J of the New Zealand Security Intelligence Service Act 1969, 11.

criticised unnamed nations for a “lack of effort” in countering terrorism.¹⁴⁵

The point was also later made by the US Ambassador to the United Nations

John Danworth:¹⁴⁶

[The Counter-Terrorism Committee] must never forget that so long as a few states are not acting quickly enough to raise their capacity to fight terrorism or are not meeting their international counterterrorism obligations, all of us remain vulnerable.

The question is no longer one of domestic security in order to prevent attacks from occurring within a State's own borders and, in doing so, assessing the risks of such attacks and the appropriate measures in response. Although those assessments and corresponding national security interests remain, effective counter-terrorism requires – to achieve international security and in light of the manner in which terrorists and terrorist organisations operate – that all States prevent and preclude terrorist conduct and preparations. A high level of threat posed to a State might cause that State to impose measures *above* those required by the international framework, but the reverse does not apply. Even if it is accepted that New Zealand does not bear any substantial risk of being the subject of a terrorist attack, its role in combating international terrorism through the implementation of the obligations set out in this chapter are equal to all other States.

¹⁴⁵ United Nations Foundation, ‘Spanish Diplomat Blames Nations for “Lack of Effort” on Terrorism’, *UN Wire*, 12 March 2004, URL <<http://www.unwire.org/UNWire>>.

¹⁴⁶ United Nations Foundation, ‘Counterterrorism Cooperation Improving, Security Council Told’, *UN Wire*, 20 July 2004, URL <<http://www.unwire.org/UNWire>>.

All of these various points are reiterated on the website of the New Zealand Security Intelligence Service:¹⁴⁷

The terrorist threat to New Zealand is low, but it cannot be discounted. The country learned at the time of the Rainbow Warrior bombing that relative geographic isolation, in itself, is no guarantee of immunity. The events in the United States on 11 September 2001 confirmed that terrorism is an international phenomenon and terrorists consider the world their stage when they look for a way to advance their cause.

There are individuals and groups in New Zealand with links to overseas organisations that are committed to acts of terrorism, violence and intimidation. Some have developed local structures that are dedicated to the support of their overseas parent bodies. There are also isolated extremists in New Zealand who advocate using violence to impress on others their own political, ethnic or religious viewpoint.

But the threat of terrorism could come equally from beyond New Zealand. Modern transport and communication have effectively made the world a smaller place. Events such as a visit by an overseas dignitary, or a major international gathering may be seen by off-shore terrorists as providing the opportunity to do something spectacular to capture world wide publicity, or to otherwise further their cause.

There is also the risk that individuals or groups may use New Zealand as a safe haven from which to plan or facilitate terrorist acts elsewhere.

2.5 Conclusion

International terrorism has been identified by both the UN General Assembly and Security Council as one of the most serious threats to international peace and security. The terrorist attacks of September 11, 2001, ultimately prompted the intervention in Afghanistan. They also shook the United Nations into concerted action in the fight to eradicate terrorism. Primarily due to a lack of international consensus on the meaning of the term, however, that action has failed to produce a comprehensive convention on terrorism. Despite the considerable work of

¹⁴⁷ New Zealand Security Intelligence Service website, *Protecting New Zealand from Terrorism*, URL <<http://www.nzsis.govt.nz/work/work.html>> at 16 November 2004.

the Security Council Counter-Terrorism Committee and the Ad Hoc Committee Established under General Assembly Resolution 51/210, the international law on counter-terrorism is mainly based upon twelve very specific conventions that do not have general application and are limited in their binding nature to States parties to those treaties. Having said this, the Suppression of Financing Convention does have potentially wider application in its description of conduct that may not be financed. While Security Council Resolutions 1269 and 1373 also fail to define the term, Resolution 1269 makes it clear that the Council has adopted an objective understanding of the term, condemning all acts of terrorism regardless of their motivation.

Both the General Assembly and Security Council have issued numerous resolutions on the topic of counter-terrorism. Although not binding, the General Assembly has built on various guiding principles and expectations in its declarations on measures to eliminate international terrorism. The Security Council established a Counter-Terrorism Committee very soon after the terrorist attacks of September 11, 2001, with the role of liaising with UN members on the implementation of Resolution 1373 and the twelve counter-terrorism conventions, as well as to provide means by which States could be assisted in doing so. The Council has imposed various specific obligations upon States under Resolutions 1373 and 1456.

New Zealand, as a party to all twelve conventions on counter-terrorism, has accepted its part in establishing an international legal framework on counter-terrorism. This, combined with the obligations under the relevant

Security Council resolutions and the principles enumerated within comparative General Assembly resolutions, places the issue beyond one of domestic security. These obligations form part of an *international* framework to counter terrorism, so that the question of implementation is not necessarily concerned with the particular terrorist threats faced by New Zealand, but rather with New Zealand's contribution to and participation in establishing an effective international framework.

Chapter 3

New Zealand's Domestic Counter-Terrorist Legislation

As seen through the previous chapter, there are various sources of international counter-terrorist obligations. This chapter will examine the domestic legislation through which those obligations have been implemented by New Zealand, as well as considering counter-terrorist legislation that exists outside the scope of those obligations. In doing so, this chapter looks at the various modes through which the international obligations can be and have been implemented. The focus will then turn on an overview and explanation of seven items of domestic legislation: the Aviation Crimes Act 1972; the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980; the International Terrorism (Emergency Powers) Act 1987; Maritime Crimes Act 1999; the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001; the Terrorism Suppression Act 2002; and the Counter-Terrorism Act 2003.

It should be mentioned that there are numerous other pieces of legislation that might be seen as contributing to countering terrorism. Just as with international law, there are various matters that are relevant to the issue of countering terrorist activities.¹ This thesis restricts itself, however, to the items of legislation just mentioned, those having been identified by New Zealand as being part of its counter-terrorist legislative regime.

¹ As discussed within Chapter Two.

Legislation and issues concerning refugee status, immigration, and detention in the context of immigration and refugee status will not, by way of example, be considered.

This chapter is divided into two parts. Part A considers the means by which New Zealand's international counter-terrorist obligations have been implemented by New Zealand which, as will be seen, depends on the nature, scope and source of the international obligation. Part B then examines the actual legislation through which those obligations have been implemented, identifying potential civil and political rights concerns in the course of doing so.

PART A: IMPLEMENTATION OF COUNTER-TERRORIST OBLIGATIONS

3.1 Modes of Implementation

The preceding chapter made reference to New Zealand's counter-terrorist obligations through various sources of international law: through customary international law; through New Zealand's membership of the United Nations; and as a State party to the twelve international conventions concerning terrorism. Each source of law displays different means of implementation and obligation. In turn, those different means of implementation bear upon the way in which domestic courts can deal with the application of the law.

It is useful to briefly note, at this stage, the divergent views on the status of international law norms in domestic law. As explained by Brownlie, there are two theories on the relationship between municipal and

international law.² The *dualist theory* posits that international and domestic laws operate in entirely separate systems, and is largely based upon the notion of State sovereignty: the principle that a State has the right to perform governmental actions to the exclusion of all others within its territory.³ Dualists distinguish international law from municipal law by three principal means. First, the subjects of international law are sovereign States, while in municipal law individuals and the State enjoy legal personality. Next, the sources of international law are founded on the notion of the equality of its subjects (States), whereas domestic law is derived from the parliamentary authority of the State. Finally, the inter-State structure of international law is different from the intra-State implementation and enforcement of domestic law. On those bases, dualist exponents such as Triepel and Strupp hold that international law is an inferior source of law and therefore does not apply at the national level unless there has been some act on the part of the State transforming the international norm into a domestic one.⁴

The *monist theory* on the “reception” of international obligations in domestic law holds that there is one, all-embracing legal order, comprising both international and domestic law. Lauterpacht, one of the more forceful and practical proponents of monism, argues that it is impossible for two norms with separate bases to be valid at the same time in the same

² Brownlie I, *Principles of Public International Law* (6th edition, Oxford University Press, 2003), 31-53.

³ As defined by Arbitrator Huber in the *Island of Palmas Case*, United Nations, 2 *Reports of International Arbitral Awards* 829, 858-859.

⁴ Triepel, *Völkerrecht und Landesrecht* (1899), and Strupp, *Eléments* (2nd edition, 1930), as cited by Brownlie, above n 2, 31 (n 2).

territory.⁵ Indeed, he effectively turns the dualist approach on its head and proposes that international law employs domestic law to govern human affairs. That is, the idea that the State is purely a vehicle used by individuals to represent their interests in the international community (by extension of the idea of the social contract by which the State is empowered to govern its people) so that when the "State" does something at international law, it is simply acting under the authority given to it by those individuals. Under the monist view there is no need to transform an international law rule into a domestic one.

Turning from theory to practice, it is interesting that many domestic courts adopt different approaches, depending upon the particular source of the international law obligation. New Zealand is no different. In the context of treaties, the courts take the dualist view that provisions of an international treaty are not applicable unless there has been some act of incorporation.⁶ As has been evidenced through a long line of authority in New Zealand courts concerning the doctrine of sovereign immunity, on the other hand, norms of customary international law need no act of transformation to be received by the courts.⁷ New Zealand courts therefore adopt a monist approach to norms of customary international law.

⁵ See, by way of example, Lauterpacht H, *International Law and Human Rights* (Stevens, London, 1950).

⁶ To be discussed further below, at 3.4.1 *Status of International Treaties in Domestic Law*.

⁷ See *Marine Steel v Government of the Marshall Island* [1981] 2 NZLR 1, 9-10 (HC) in which Barker J recognised, in an obiter statement, the relevance of the customary international law rule of sovereign immunity and that no special act of transformation was required in the application of such rules by New Zealand courts. In *Reef Shipping v The Ship "Fua Kavenga"* [1987] 1 NZLR 550, 569 (HC) in which Smellie J indeed applied the doctrine in New Zealand. The New Zealand Court of Appeal also applied the doctrine in *Governor of Pitcairn and*

3.2 Customary International Law

As noted within Chapter Two, international obligations concerning terrorism are not restricted to treaties and resolutions of the United Nations. The customary international law norms reflected within the Geneva Conventions include the prohibition against acts or threats of violence, the primary purpose of which is to spread terror among the civilian population – article 13(2) of the First Protocol.⁸ What should be noted at this stage is that there is no corresponding domestic law provision in New Zealand. New Zealand is a party to all four Geneva Conventions and its two protocols,⁹ and has “incorporating legislation” through the Geneva Conventions Act 1958. However, the Act only prohibits “grave breaches” of the Conventions or First Protocol under section 3(1). Subsection (2) sets out which provisions of the Conventions or First Protocol amount to “grave breaches”, but this does not include breach of article 13(2) of the First Protocol.

Associated Islands v Sutton [1995] 1 NZLR 426, Cooke P referring to the doctrine as part of “common law, reflecting international law” (428).

⁸ Article 13(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978).

⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 32 (entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 136 (entered into force 21 October 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950); Protocol I, *ibid*; and the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 610 (entered into force 7 December 1978).

The customary norm reflected in article 13(2) is thus not reflected within New Zealand's domestic legislation. As a norm of customary international law, however, it is applicable at domestic law without any act of transformation. The question, then, is *what is the resultant significance of the prohibition?* In the writer's view, the significance is two-fold. First, the New Zealand State is prohibited from undertaking such acts or threats. Second, the description of prohibited conduct within article 13(2) is a norm of customary law that is directly applicable by New Zealand's courts. Before taking either point any further, however, it should be noted that the First Protocol is not framed in general terms. Its full title is the "Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts" (emphasis added). Thus (1) the New Zealand State is prohibited from engaging in such conduct when involved in an international armed conflict; and (2) although directly applicable in domestic law by New Zealand courts, this norm would be restricted in its application to the consideration by the courts of the conduct of a person or agency involved in an international armed conflict.

The only potentially wider utility of the norm would lie in a willingness by the New Zealand courts to interpret legislation concerning counter-terrorism in a manner that is consistent with the prohibition: a prohibition against acts or threats of violence, the primary purpose of which is to spread terror among the civilian population.

3.3 United Nations Action

Both the United Nations General Assembly and Security Council have been active in adopting resolutions concerning the combating of terrorism. Due to the differing status of resolutions by each body, consideration of Security Council and General Assembly action is undertaken separately.

3.3.1 Resolutions of the Security Council

Two resolutions of the UN Security Council have been identified as imposing obligations upon member States of the United Nations concerning counter-terrorism: Resolutions 1269 and 1373.¹⁰ As also discussed within Chapter Two, resolutions of the Security Council are binding upon members of the United Nations by virtue of article 25 of the Charter of the United Nations.

It must be determined, therefore, whether the resolutions in question are “decisions of the Security Council” within the terms of article 25. If so, then their provisions must be complied with by New Zealand, and consideration of the nature of the obligations and means of compliance will then need to be had. If the resolutions, or parts of them, are not binding under article 25, then different considerations will result. In that regard, it was concluded within Chapter Two that (1) the resolutions were made within the proper mandate of the Security Council under article 24 and Chapter V of the UN Charter; and (2) whether a particular provision of a

¹⁰ United Nations Security Council Resolutions 1269 of 19 October 1999, S/RES/1269 (1999), and 1373 of 21 September 2001, S/RES/1373 (2001).

resolution is a “decision” within the meaning of article 25 turns on whether the provision uses exhortatory or mandatory language.¹¹

The result of the latter analysis, as well as the nature of the provisions at hand, is that the obligations under resolutions 1269 and 1373 fall within three categories: binding obligations; non-binding directions; and non-binding reporting obligations.

3.3.1(a) Non-binding reporting regime. Under Resolution 1373, the Security Council established what the writer describes as a reporting and monitoring dialogue between UN members and the Counter-Terrorism Committee:

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

New Zealand has so far submitted four reports to the Counter-Terrorism Committee under the procedure initiated under Resolution 1373.¹² The

¹¹ Applying the decision of the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1990)*, (1970-1971), Advisory Opinion of the International Court of Justice of 21 June 1971, 53.

¹² New Zealand's reports to the Security Council Counter-Terrorism Committee were lodged between 2001 and 2004 as follows:

- New Zealand's first report: *Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001*, New Zealand, 2 January 2002, S/2001/1269;
- New Zealand second report: *Supplementary report providing additional information on the measures taken by New Zealand to implement the provisions of Security Council resolution 1373 (2001)*, 19 July 2002, S/2002/795;

reports contend that New Zealand is now fully compliant with its international counter-terrorist obligations. The accuracy or otherwise of that contention is considered within the examination of various items of New Zealand legislation, later in this chapter, and within the following discussion on the binding substantive provisions of Resolutions 1373.

3.3.1(b) Binding obligations. Interestingly, Resolution 1269 contains no binding substantive obligations, which reflects the increased attention paid to counter-terrorism since September 11. Two of those non-binding directions, however, transformed into mandatory obligations within Resolutions 1373. The first of those relates to the prevention and suppression of the financing of terrorism,¹³ which became the subject of detailed attention within paragraphs 1 and 2 of Resolution 1373. The second concerns the apprehension, prosecution or extradition of those who plan, finance or commit terrorist acts,¹⁴ now the subject of attention within paragraph 2 of Resolution 1373. The entirety of the binding substantive obligations is contained within paragraphs 1 and 2 of Resolution 1373, set out earlier within Chapter Two.¹⁵

These binding obligations were implemented into New Zealand law under the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001, by Order in Council on 26

-
- New Zealand's third report: *New Zealand response to the questions and comments of the Security Council Counter-Terrorism Committee contained in the Chairman's letter of 30 May 2003*, 5 September 2003, S/2003/860; and
 - New Zealand's fourth report: *New Zealand response to the United Nations Security Council Counter-Terrorism Committee questions for response by 30 April 2004*, 7 May 2004, S/2004/359.

¹³ Resolution 1269, para 4 (second unnumbered subparagraph).

¹⁴ Resolution 1269, para 4 (third unnumbered subparagraph).

¹⁵ Chapter Two, 2.3.2 *United Nations Security Council*.

November 2001 under the United Nations Act 1946. As indicated by New Zealand to the Counter-Terrorism Committee in its first report to the Committee, these regulations were made by way of interim measure, pending the enactment of the then Terrorism (Bombings and Financing) Bill.¹⁶ The regulations were to expire on 30 June 2002, by which time the Bill was expected to have passed through Parliament.¹⁷ Due, however, to the early dissolution of the New Zealand Parliament prompted by early elections in July 2002, the life of the regulations was extended to 31 December 2002 by the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2002. The substance of the regulations is considered in more detail below.¹⁸

The obligations under Resolution 1373 have since been incorporated within the Terrorism Suppression Act 2002.¹⁹ The substance of this piece of legislation is also considered in more detail below. The reason for translating these obligations into the Terrorism Suppression Act, rather than leaving them as regulatory provisions, lies in the fact that penalties for regulatory offences are limited.²⁰ Liability for the breach of regulations made under the United Nations Act is set at a maximum of 12 months imprisonment, or a \$10,000 fine in the case of a person, or a fine up to

¹⁶ See New Zealand's first report to the Counter-Terrorism Committee, above n 12, 7.

¹⁷ Regulation 3.

¹⁸ Discussed at 3.10 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and Amending Regulations.

¹⁹ For a detailed account on how New Zealand's sees that it has complied with these operative provisions (paragraphs 1 and 2), see its first report to the Counter-Terrorism Committee, above n 12, 6-15.

²⁰ As explained in New Zealand's first report to the Counter-Terrorism Committee, *ibid*, 5.

\$100,000 in the case of a company or corporation.²¹ The nature of terrorist-related offences calls, however, for severe penalties.²² Offences under the Terrorism Suppression Act reflect this.²³

New Zealand has identified the following features of the Terrorism Suppression Act as measures by which it has implemented Resolution 1373:

- *Para 1(a): prevent and suppress the financing of terrorist acts.*

Paragraph 1(a), which requires the prevention and suppression of the financing of terrorist acts, is a general provision, expanded upon by the subparagraphs that follow it. In addition of those more specific requirements, New Zealand identified the fact that the Reserve Bank of New Zealand took steps to notify financial institutions of these requirements and prohibitions.²⁴ In addition, funding for security and counter-terrorism has been boosted, with the Minister for Foreign Affairs and Trade identifying the post-September 11 environment as requiring this.²⁵

²¹ United Nations Act 1946, section 3(1).

²² As called for within the various international anti-terrorism treaties concerned, and within United Nations Security Council Resolution 1373.

²³ Discussed at 3.11.2(b) *Offences*.

²⁴ See New Zealand's first report to the Counter-Terrorism Committee, above n 12, 6.

²⁵ The Budget 2003 provided an additional \$5.9 million for 2004 and \$1.9 million in future years: Hon Phil Goff, 'Funding boost for security, counter-terrorism and emergency responses', Beehive Press Release 12 May 2003, URL <<http://www.bhive.govt.nz/PrintDocumentcfm?DocumentID=16723>> at 17 May 2003.

- *Para 1(b): criminalise the provision of funds for terrorist acts.* In compliance with this provision of Resolution 1373, the Act creates offence of the financing of terrorism.²⁶
- *Para 1(c): freeze funds and assets of terrorist entities.* The freezing of assets is said to be given effect to through various provisions of the Act.²⁷ New Zealand has described the establishment of various stages in achieving this obligation.²⁸ The first stage is to identify the assets to be frozen, through sections 20 to 42 inclusive, which provide a process by which individuals or groups may be designated as terrorist or associated entities.²⁹ Next, obligations are imposed upon financial institutions to report suspicions of the holding or control of property belonging to or controlled by such entities (sections 43 to 47).³⁰ Third, section 9 of the Act prohibits dealing with property belonging to terrorist entities.³¹ Finally, sections 55 to 61 establish procedures through which terrorist assets can be forfeited.³²
- *Para 1(d): prohibit the provision of financial or related services to terrorist entities.* Responding to paragraph 1(d) of the Resolution, section 10 makes it unlawful to make property, or financial or related

²⁶ Section 8 of the Terrorism Suppression Act 2004, discussed below at 3.11.2(b) *Offences*. See New Zealand's first report to the Counter-Terrorism Committee, *ibid*, 6-7, which also refers to the defining provisions of the Act (sections 4 and 5 – discussed below at 3.11.2(a) *Definition of "terrorist act"*) and the extraterritorial jurisdiction attached to the offences (sections 14, 15, 17 and 18).

²⁷ See New Zealand's first report to the Counter-Terrorism Committee, above n 12, 7-9.

²⁸ As explained within New Zealand's report to the United Nations 1267 Committee, *Response of New Zealand to the Security Council Committee under Security Council resolution 1455 (2003)*, 17 April 2003, 4-7.

²⁹ Discussed at 3.11.2(c) *Designation of "terrorist entities"*.

³⁰ Discussed at 3.11.2(e) *Financial transactions reporting*.

³¹ Discussed at 3.11.2(b) *Offences*.

³² Discussed at 3.11.2(d) *Forfeiture of terrorist property*.

services available to terrorist or associated entities (subject to the express permission of the Prime Minister under section 11).

- *Para 2(a): suppress support to terrorists and eliminate supply of weapons.* In compliance with paragraph 2(a), the Terrorism Suppression Act prohibits the recruitment of persons into terrorist groups, under section 12, and participation in terrorist groups (section 13).³³ New Zealand reported that existing law would see New Zealand comply with the requirement to work towards the elimination of the supply of weapons to terrorists, pointing to the Customs Prohibition Order 1996,³⁴ the Arms Act 1983,³⁵ the Crimes Act 1961 (prohibiting the unlawful possession of an offensive weapon),³⁶ the New Zealand Nuclear Weapons Free Zone, Disarmament and Arms Control Act 1987,³⁷ and the Chemical Weapons (Prohibition) Act 1966,³⁸ together with its intended ratification of the Firearms Protocol to the United Nations Convention against Transnational Organized Crime.³⁹ New Zealand also reported that it would become party to the plastic explosives and nuclear materials conventions, which would see it create offences under the Terrorism Suppression Act, as required by the treaties and create corresponding offences.⁴⁰ This was ultimately done through sections 13B, 13C and 13D of the latter Act.

³³ Discussed at 3.11.2(b) *Offences*.

³⁴ Made under the Customs and Excise Act 1996.

³⁵ See New Zealand's second report to the Counter-Terrorism Committee, above n 12, 6.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Not yet in force. See New Zealand's first report, above n 12, 11. See, also, New Zealand's report to the United Nations 1267 Committee, above n 28, 8-9.

⁴⁰ See New Zealand's second report, above n 12, 6.

- *Para 2(b): prevent the commission of terrorist acts.* Additional to the above matters, New Zealand identified measures through which the New Zealand police and intelligence community can investigate groups or organisations of interest.⁴¹ Under the Counter-Terrorism Act, this has seen the creation of authority to obtain interception warrants, warrants to attach tracking devices to persons or things, deterrence through more severe penalties, and requiring a computer owner or user to provide information to access data subject to security codes and the like.⁴²
- *Para 2(c): deny safe haven.* Sections 7, 73 and 75 of the Immigration Act 1987 (already extant at the time of the adoption of Resolution 1373) were identified by New Zealand as satisfying the requirement to deny safe haven to terrorists.⁴³
- *Para 2(d): prevent the use of State territory by terrorists.* The extraterritorial nature of the offences created under the Terrorism Suppression Act, together with extant party liability provisions under the Crimes Act 1961, were identified as further measures to prevent terrorists acting from New Zealand territory against other States of citizens.⁴⁴ The further creation of offences of harbouring or concealing terrorists was relied on (offences under 13A of the Terrorism Suppression Act).⁴⁵

⁴¹ See New Zealand's first report to the Counter-Terrorism Committee, above n 12, 11.

⁴² Discussed at 3.12.3 *Parts 1 and 3 of the Counter-Terrorism Act*.

⁴³ See New Zealand's first report to the Counter-Terrorism Committee, above n 12, 11-12.

⁴⁴ *Ibid*, 12.

⁴⁵ Discussed at 3.11.2(b) *Offences*.

- *Para 2(e): ensure prosecution and severe punishment.* As discussed later in this chapter, the various offences created under the Terrorism Suppression Act carry severe penalties.⁴⁶
- *Para 2(f): assist in criminal investigations and prosecutions.* New Zealand again reported that current law permitted New Zealand to comply with this paragraph, referring to the Mutual Assistance in Criminal Matters Act 1992 and the Extradition Act 1999.⁴⁷
- *Para 2(g): effective border controls to prevent the movement of terrorists.* The Passports Act 1992 and Immigration Act 1987 were identified by New Zealand as means through which compliance with paragraph 2(g) of the Resolution could be achieved.⁴⁸

3.3.1(c) Non-binding directions. Both Resolutions 1269 and 1373 contain exhortatory, and therefore non-binding, directions. To begin with, both resolutions call upon States to become party to and fully implement all twelve conventions concerning terrorism.⁴⁹ They also call upon United Nations members to:

- Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications

⁴⁶ Discussed at 3.11.2(b) *Offences*. See also See New Zealand's first report to the Counter-Terrorism Committee, above n 12, 13-14.

⁴⁷ See New Zealand's first report to the Counter-Terrorism Committee, *ibid*, 14.

⁴⁸ *Ibid*, 14-15.

⁴⁹ Resolutions 1269, para 2, and 1373, para 3(d) and (e).

technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups.⁵⁰

- Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts.⁵¹
- Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts.⁵²
- Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts.⁵³
- Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.⁵⁴

An important point needs to be made about the latter two directions, concerning refugee status. The impact of counter-terrorism upon refugee status applications and, by executive extension, upon immigration policies and legislation is something that has been of considerable concern to civil libertarians and refugee and immigration lawyers in many States. The

⁵⁰ Resolution 1373, para 3(a).

⁵¹ Resolution 1373, para 3(b).

⁵² Resolutions 1269, para 4 (first unnumbered subparagraph), and 1373, para 3(c).

⁵³ Resolutions 1269, para 4 (fourth unnumbered subparagraph), and 1373, para 3(f)

⁵⁴ Resolution 1373, para 3(g).

detention of such persons has been of particular concern. These clearly are issues that affect the interface of counter-terrorism with the human rights of immigrants and asylum seekers. Notwithstanding that fact, consideration of this particular interface will not be had within this thesis. This is not to downplay the significance of the issues involved, but it is to reflect the reality that immigration and refugee law is a very specialised and extensive area of law. Given the number of issues that will be identified within examination of principal counter-terrorist legislation (below), one cannot possibly hope to cover those issues *as well as* refugee and immigration issues within one thesis.

In terms of the balance of non-binding directions, the first point to note is that New Zealand has become party to all twelve anti-terrorism conventions. Although this direction has been identified as a non-binding one, it is interesting to note that this is an area where a great number of States have acted to become party to the conventions. This is partly due, it is posited, to the fact that the issue of participation in these treaties has been one of the recurring matters addressed by the Security Council Counter-Terrorism Committee in its “dialogue” with States. A striking example can be seen in the case of New Zealand becoming party to the Convention on the Marking of Plastic Explosives for the Purpose of Detection and the Convention on the Physical Protection of Nuclear Materials.⁵⁵ It was noted within the two relevant National Interest

⁵⁵ Convention on the Marking of Plastic Explosives for the Purpose of Detection, opened for signature 1 March 1991, ICAO Doc 9571 (entered into force 21 June 1998), and the Convention on the Physical Protection of Nuclear Materials, opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987).

Analyses prepared by the Ministry of Foreign Affairs and Trade (discussed below) that New Zealand neither manufactures explosives domestically, nor engages in the transportation of nuclear material.⁵⁶ Notwithstanding this, the Analyses referred to the call by the Security Council for UN members to become party to all anti-terrorism conventions⁵⁷ as a sound reason for New Zealand becoming a party to the conventions.⁵⁸

The balance of the directions concern cooperation in the international framework to counter terrorism. Within the very first paragraph of New Zealand's first report to the Counter-Terrorism Committee, New Zealand declared that it was contributing to counter-terrorism "across the full range of diplomatic, legal financial, humanitarian, intelligence and military activities".⁵⁹ New Zealand has pointed to executive action as including an ad hoc working group of the Department of the Prime Minister and Cabinet examining the existing and potential measures to combat terrorism, and an increase in the physical protection of high profile or significant facilities, aviation security and border control.⁶⁰ New Zealand identified itself as active in consulting with other countries on how to strengthen anti-terrorist

⁵⁶ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 2, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 4.

⁵⁷ See United Nations Security Council Resolution 1373 of 21 September 2001, S/RES/1373 (2001), para 3(d).

⁵⁸ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 2, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, paras 5 and 7.

⁵⁹ See New Zealand's first report to the Counter-Terrorism Committee, above n 12, 3.

⁶⁰ *Ibid*, 4.

measures, including work of raising the awareness of Pacific Island countries.⁶¹

One particular issue warrants some discussion before concluding the examination of Resolution 1373. In response to the Counter-Terrorism Committee's question concerning steps taken by New Zealand to intensify the obtaining and exchange of operational information, New Zealand has pointed to the Interception Capability Bill as the vehicle through which telecommunications network operators would need to make their networks "interception capable".⁶² The Bill was enacted in 2004 as the Telecommunications (Interception Capability) Act 2004. What should be noted is that the Act does not create any powers of interception, nor any authority to apply for warrants of interception. Its aim is to require network operators to ensure that public telecommunications networks and services have interception capability.⁶³ For that reason, the Act will not be given separate consideration within this chapter. It is relevant, in the privacy context, to simply note the principles identified within section 6 of the Act:

The following principles must be applied by persons who exercise powers and carry out duties under this Act if those principles are relevant to those powers or duties:

- (a) the principle that the privacy of telecommunications that are not subject to an interception warrant or any other lawful interception authority must be maintained to the extent provided for in law;
- (b) the principle that the interception of telecommunications, when authorised under an interception warrant or any other lawful interception authority, must be carried out without unduly interfering with any telecommunications.

⁶¹ Ibid, 5. See, in particular, pages 15-18 of the report.

⁶² See New Zealand's first report to the Counter-Terrorism Committee, above n 12, 11. See also New Zealand's second report, above n 12, 10.

⁶³ See sections 5 and 7 of the Act.

3.3.2 Resolutions of the General Assembly

The UN General Assembly adopted the Declaration on Measures to Eliminate International Terrorism in 1994, calling upon members of the United Nations to take various measures to prevent and suppress terrorism, and prevent their territories from being used as bases for terrorist training and support.⁶⁴ The Declaration has been restated and expanded upon by the Assembly in 1995,⁶⁵ 1996,⁶⁶ 1998,⁶⁷ 2000,⁶⁸ 2001,⁶⁹ 2002,⁷⁰ 2003⁷¹ and 2004.⁷² As also discussed within Chapter Two, however, is that although these resolutions are compelling and strongly worded (despite their lack of a definition of the term “terrorism”) they are not, in and of themselves, binding upon members of the UN. Article 10 of the Charter dictates that resolutions of the General Assembly are recommendatory only.

At first instance, then, the utility and relevance of the Declarations, from a domestic law perspective, may seem lacking. There is, however, a means through which the *contents* of the Declarations might influence or inform municipal courts. Although resolutions of the Assembly are not, by virtue of article 10, binding upon members of the United Nations, they

⁶⁴ As discussed within Chapter Two. See United Nations General Assembly Resolution 49/60 of 9 December 1994, A/RES/49/60.

⁶⁵ United Nations General Assembly Resolution 50/53 of 11 December 1995, A/RES/50/53.

⁶⁶ United Nations General Assembly Resolution 51/210 of 17 December 1996, A/RES/51/210.

⁶⁷ United Nations General Assembly Resolution 52/165 of 19 January 1998, A/RES/52/165.

⁶⁸ United Nations General Assembly Resolution 54/110 of 2 February 2000, A/RES/54/110.

⁶⁹ United Nations General Assembly Resolution 55/158 of 30 January 2001, A/RES/55/158.

⁷⁰ United Nations General Assembly Resolution 56/88 of 24 January 2002, A/RES/56/88.

⁷¹ United Nations General Assembly Resolution 57/27 of 15 January 2003, A/RES/57/27.

⁷² United Nations General Assembly Resolution 58/81 of 8 January 2004, A/RES/58/81.

might nevertheless constitute *prima facie* evidence of customary international law. If the Declarations do indeed reflect customary international law, they are binding in domestic law without any act of transformation.⁷³

In brief terms, customary international law comprises two elements: a *corpus* (a custom or practice that has evolved over time) and an *animus* (an sense on the part of the participants in the custom that they act in they way they do because they are legally bound to – *opinio juris sive necessitatis*).⁷⁴ Custom must take the form of State conduct. It must be uniform and consistent to a degree that the core of the State practice exhibits these characteristics.⁷⁵ The practice must be participated in by a sufficient number of States so that it can be said to be generally applied.⁷⁶ It must normally also have existed for a period of time so that it may indeed be called a “custom”.⁷⁷ Most importantly, it must be exercised through a sense of legal obligation, rather than for political expedience or convenience.⁷⁸

Whether or not the General Assembly Declarations are reflective of customary law is therefore dependent on whether they are reflective of

⁷³ See above discussion concerning customary law, 3.1 Modes of Transformation.

⁷⁴ Brownlie, above n 2, 6-9.

⁷⁵ See, for example, the judgment of the International Court of Justice in the *Asylum Case (Colombia v Peru)* (1950) ICJ Reports 266, 276-277.

⁷⁶ See, for example, the judgment of the International Court of Justice in the *Fisheries Jurisdiction Case (United Kingdom v Iceland)* (1974) ICJ Reports 3, 23-26.

⁷⁷ Although it should be said that if the other two aspects of consistency and generality are found in strong measure, the requirement for duration is not as important: see *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* (1969) ICJ Reports 3, para 74.

⁷⁸ See, for example, the *Lotus Case*, Permanent Court of International Justice, Ser. A, no. 10, 28, and the *North Sea Continental Shelf Cases*, *ibid*, para 71.

actual State practice, such practice undertaken through a sense of legal obligation. If one considers the various State reports lodged with the Security Council Counter-Terrorism Committee, assuming that those reports mirror *actual* conduct, one can see that there has been a reasonable level of consistency between State conduct and the various principles enumerated in the Declarations.⁷⁹ Furthermore, the repeated adoption of the principles tends to point towards a practice of duration, from 1994 to the present, albeit that this is reasonably brief in the normal life of the emergence of customary law. In terms of generality, however, although all members of the United Nations have reported to the Committee, they have not all adopted counter-terrorist measures within the terms recommended within the Declarations.⁸⁰ In determining whether the elements of generality and *opinio juris* are satisfied, therefore, one would need to undertake a very close analysis of the State reports and the actual status and use of counter-terrorist legislation within each reporting State.

This is not an issue that will be taken any further in this thesis for two reasons. First, such an examination would need to be very extensive to produce any determinative findings. Second, the value of those findings does not appear to add little to the thesis topic. This is the case because

⁷⁹ State reports to the Committee are available online at URL <<http://www.un.org/Docs/sc/committees/1373/reports.html>>.

⁸⁰ Take for example, Fiji, who reported to the Committee in 2002 and 2003, but has only recently announced that it is preparing counter-terrorist legislation: see *Report of the Government of Fiji pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001*, 4 June 2002, S/2002/616, and *Fiji's second round of responses based on the letter dated 8 August 2002*, 25 April 2003, S/2003/481; and compare with Shameem S, "Tension Between Anti-Terrorism Laws and Human Rights", presentation at the public workshop, *How Should Fiji Respond to the Threat of Terrorism?*, hosted by the Citizens' Constitutional Forum and the Fiji Human Rights Commission, 17 July 2004, Suva, Fiji.

such norms (if they are customary norms) hold little relevance to domestic law in the hands of the judiciary. In general terms, the principles within the Declarations are mirrored within the Security Council resolutions discussed and within the international conventions on terrorism to which New Zealand is a party. Through incorporating legislation, those obligations have become part of municipal law. The Declarations therefore add little, in practical terms, to the manner in which New Zealand's domestic law on counter-terrorism is to be applied by the judiciary.

3.4 International Treaties

New Zealand is party to all twelve conventions identified within Chapter Two as international treaties on terrorism. This part of the chapter considers the status of treaties in municipal law and the manner in which they are incorporated, or transformed, into domestic law. Consideration is then given to each of the twelve conventions and the means by which these have been incorporated.

3.4.1 Status of International Treaties in Domestic Law

Unlike customary international law, which is part of the law of New Zealand without the need for incorporation by statute, treaties require incorporation to become part of domestic law. Here, the New Zealand courts adopt a dualist approach.

In the often cited decision of the House of Lords in *Attorney-General for Canada v Attorney-General for Ontario*, Lord Atkin drew a distinction between the formation of a treaty on the one hand and the performance of

the obligations under the treaty on the other.⁸¹ He observed that, in the British Empire, the formation of a treaty is a matter for the executive, while performance lay within the purview of the legislature, by enactment into statute of the responsibilities undertaken through the treaty.

The latter decision was relied on by the New Zealand Court of Appeal in the court's consideration of a police warrant to recover the black boxes of an Ansett aircraft in *New Zealand Air Line Pilot's Association Incorporated v Attorney-General and Others*.⁸² Although certain provisions of the Chicago Convention on International Civil Aviation⁸³ seemed to preclude the recovery of black boxes, the particular provisions had not been implemented in New Zealand law by legislation and the warrants were allowed to stand. Similarly, in considering the status of the Treaty of Waitangi in *Te Heuheu Tukino v Aotea District Maori Land Board*, Chief Justice Myers had earlier held that:⁸⁴

A treaty only becomes enforceable as part of the municipal law if and when it is made so by legislative authority.

3.4.2 Incorporation of International Treaties

In response to a report of the New Zealand Law Commission in 1997,⁸⁵ mainly concerned with the issue of democratic oversight in the treaty-making process, procedures for the making of treaties and the incorporation of their provisions are now set out within Parliamentary Stating Orders 382

⁸¹ *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347-348.

⁸² *New Zealand Air Line Pilot's Association Incorporated v Attorney-General and Others* [1997] 3 NZLR 269, 280-285.

⁸³ Opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947).

⁸⁴ *Te Heuheu Tukino v Aotea District Maori Land Board* [1939] NZLR 107, 120.

⁸⁵ New Zealand Law Commission, *The Treaty Making Process: Reform and the Role of Parliament*, Report No 45 (1997, Wellington).

to 385 inclusive.⁸⁶ The Standing Orders establish a three-step process, effective from September 1999.⁸⁷ The first involves steps to be taken when a treaty is first adopted and signed, or where the Executive is contemplating acceding to a treaty. In that event, Standing Order 382 requires all multilateral treaties and “significant” bilateral treaties to be presented to the House with a National Interest Assessment (NIA). Standing Order 383 sets out the various issues that must be address within a NIA, including the reasons for becoming a party to the treaty, the advantages and disadvantages of this, the costs of compliance and the steps that need to be taken to implement the obligations under the treaty. The treaty, with the accompanying NIA, must then be considered by the Foreign Affairs, Defence and Trade Committee for it to prepare a report to the House. In doing so, the Committee is required to determine whether the treaty should be brought to the attention of the House due to any matters covered by the NIA or “for any other reason”.⁸⁸

The second step is to introduce legislation through which the treaty obligations are to be incorporated into domestic law. This will be accompanied by the Committee’s report, to which the National Interest Assessment must be appended.⁸⁹ Only once the legislation is passed as an Act of Parliament will the Executive take the final step of ratifying the

⁸⁶ New Zealand, *Standing Orders of the House of Representatives*, brought into force 20 February 1996, amended 22 August 1996, 8 September 1999 and 16 December 2003.

⁸⁷ The Standing Orders in question were included in the amendment of the *Standing Orders of the House of Representative* of 8 September 1999, *ibid.*

⁸⁸ Standing Orders 384 and 385.

⁸⁹ Standing Order 385.

treaty, thereby making its provisions (as translated by an enactment) binding at international law upon New Zealand.⁹⁰

3.4.3 *Incorporation of the International Terrorism Treaties*

At the time of the September 11 attacks and adoption of Security Council Resolution 1373 in 2001, New Zealand was a party to eight of the twelve international terrorism conventions, as follows.

3.4.3(a) *Safety of aviation.* Four international conventions on terrorism relate to the safety of aircraft and civil aviation in general:

- Convention on Offences and Certain Other Acts Committed on Board Aircraft.⁹¹ Adopted in 1963, the “Tokyo Convention” was signed by New Zealand on 12 February 1974 and ratified on 13 May 1974.⁹²
- Convention for the Suppression of Unlawful Seizure of Aircraft.⁹³ Adopted in 1970, New Zealand signed the “Hague Convention” on 15 September 1971 and ratified on 12 February 1974.⁹⁴
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.⁹⁵ Adopted in 1971, the “Montreal Convention” was

⁹⁰ Assuming that the treaty has come into force. The question of when a treaty comes into force is a matter provided for within the text of the treaty itself, normally calling for a certain number of ratifications to be lodged.

⁹¹ Opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969).

⁹² As recorded by the International Civil Aviation Organization (ICAO) in its *Treaty Collection*, as at 12 October 2004 at URL <<http://www.icao.int/icao/en/leb/Tokyo.htm>>.

⁹³ Opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971).

⁹⁴ As recorded ICAO, above n 92, at URL <<http://www.icao.int/icao/en/leb/Hague.htm>>.

⁹⁵ Opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).

signed by New Zealand on 26 September 1972 and ratified at the same time as the latter convention, on 12 February 1974.⁹⁶

- Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.⁹⁷ The “Montreal Protocol”, adopted in 1988, was signed by New Zealand on 11 April 1989 and ratified on 2 August 1999.⁹⁸

These treaties were incorporated into New Zealand law by the Aviation Crimes Act 1972, considered further below.⁹⁹ New Zealand did not lodge reservations to any of the four aviation conventions.

3.4.3(b) Safety of persons. The following two conventions are directed towards the safety of persons:

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.¹⁰⁰ This treaty was adopted in December 1973, with New Zealand not being an original party to the treaty. New Zealand became a State party by accession on 6 December 1988.¹⁰¹

⁹⁶ As recorded ICAO, above n 92, at URL <<http://www.icao.int/icao/en/leb/Mtl71.htm>>.

⁹⁷ Opened for signature 24 February 1988, ICAO Doc 9518 (entered into force 6 August 1989).

⁹⁸ As recorded ICAO, above n 92, at URL <<http://www.icao.int/icao/en/leb/Via.htm>>.

⁹⁹ Discussed at 3.6 Aviation Crimes Act 1972.

¹⁰⁰ Opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977).

¹⁰¹ As recorded by the United Nations in its record on *Multilateral Treaties Deposited with the Secretary-General*, as at 12 October 2004 at URL <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty7.asp>.

- International Convention against the Taking of Hostages.¹⁰² Adopted in 1979, the treaty was signed by New Zealand on 24 December 1980 and ratified on 12 November 1985.¹⁰³

Also relevant to the protection and safety of persons, although not listed by the Terrorism Prevention Branch as one of the twelve conventions relating to terrorism, is the Convention on the Safety of United Nations and Associated Personnel.¹⁰⁴ All three treaties were incorporated under the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980. The Act is considered below.

3.4.3(c) Maritime safety. Finally, of the eight terrorism conventions to which New Zealand was a party prior to Resolution 1373, there are two treaties concerning maritime safety:

- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.¹⁰⁵ Adopted in 1988, the “Rome Convention” was signed by New Zealand as an original signatory on 10 March 1988.
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.¹⁰⁶ The “Rome Protocol”, adopted at the same time as its parent convention, was again signed by New Zealand on 10 March 1988.

¹⁰² Opened for signature 18 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

¹⁰³ As recorded by the United Nations, above n 101, <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty5.asp>.

¹⁰⁴ Opened for signature 9 December 1994, 2051 UNTS 391 (entered into force 15 January 1999).

¹⁰⁵ Opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992).

¹⁰⁶ Opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992).

The conventions were incorporated under the Maritime Crimes Act 1999, also considered further below.¹⁰⁷

3.4.4 Legislative Incorporation since September 11

At the date of the adoption of Security Council Resolution 1373, New Zealand was not a party to the following four international treaties on terrorism:

- International Convention for the Suppression of Terrorist Bombing.¹⁰⁸
- International Convention for the Suppression of the Financing of Terrorism.¹⁰⁹
- Convention on the Physical Protection of Nuclear Material.¹¹⁰
- Convention on the Marking of Plastic Explosives for the Purpose of Detection.¹¹¹

As reported by New Zealand to the Counter-Terrorism Committee, New Zealand became party to the first two of these treaties after the enactment of the Terrorism Suppression Act 2002.¹¹² It became party to the

¹⁰⁷ Discussed at 3.8 Maritime Crimes Act 1999.

¹⁰⁸ Opened for signature 12 January 1998, 2149 UNTS 286 (entered into force 23 May 2001).

¹⁰⁹ Opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

¹¹⁰ Above n 55.

¹¹¹ Ibid.

¹¹² As confirmed in New Zealand's third report to the Counter-Terrorism Committee, above n 12, 6-7. New Zealand acceded to the International Convention for the Suppression of Terrorist Bombing on 4 November 2002: as recorded by the United Nations, above n 101, <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty9.asp>. The International Convention for the Suppression of the Financing of Terrorism was signed by New Zealand on 7 September 2000 but not ratified until 4 November 2002: as recorded by the United Nations, above n 101, <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp>.

remaining conventions on 21 September 2004, after enactment of the Counter-Terrorism Act 2003.¹¹³

In terms of the incorporating procedures discussed above,¹¹⁴ the three-step process for implementation of the treaties identified was followed, albeit with some points of interest. As treaties that were subject to ratification or accession by New Zealand, Parliamentary Standing Order (PSO) 384 applied,¹¹⁵ so that the four conventions had to be referred to the Foreign Affairs, Defence and Trade Committee (FADTC)¹¹⁶ with a National Interest Analysis¹¹⁷ and then presented to the House.¹¹⁸

The National Interest Analyses (NIAs) were prepared by the Ministry of Foreign Affairs and Trade, addressing each of the matters required under PSO 385, and then forwarded to the FADTC. In preparation of the Analyses, the Ministry consulted with the Ministry of Justice, Police, New Zealand Defence Force, Ministry of Defence, Security Intelligence Service, Treasury, Reserve Bank, Departments for Courts and of Corrections, Te Puni Kokiri, Customs, the Immigration Service, the Environmental Risk Management Authority, Ministry of Transport, Civil Aviation Authority, Occupational Health and Safety Service, Ministry of Health (National

¹¹³ In its third report to the Counter-Terrorism Committee, New Zealand indicated it would become party to these conventions following the enactment of the Counter-Terrorism Bill, *ibid*, 4. New Zealand's accession to the Convention on the Physical Protection of Nuclear Material is recorded in the *Status Register* of the International Atomic Energy Agency, as at 21 September 2004, at URL <http://www.iaea.org/Publications/Documents/Conventions/cppn_status.pdf>. It's accession to the Convention on the Marking of Plastic Explosives for the Purpose of Detection is recorded by ICAO, above n 92, at URL <<http://www.icao.int/icao/en/leb/MEX.htm>>.

¹¹⁴ See 3.4.2 *Incorporation of International Treaties*.

¹¹⁵ See Parliamentary Standing Order 384, para (1).

¹¹⁶ *Ibid*, para (3).

¹¹⁷ *Ibid*, para (2).

¹¹⁸ *Ibid*, para (1).

Radiation Laboratory), Maritime Safety Authority, Land Transport Safety Authority and the Institute of Geological and Nuclear Sciences.¹¹⁹

The Analyses, which are each contained within the respective international treaty examination reports of the FADTC, identify New Zealand's desire to become party to the conventions as being based upon its support of efforts to strengthen the rule of law at the international level¹²⁰ and support for an effective and well-supported network of multilateral legal instruments to combat terrorism.¹²¹ In the case of the "Plastic Explosives" and "Nuclear Materials" conventions,¹²² the NIAs noted that New Zealand neither manufactures explosives domestically, nor engages in the transportation of nuclear material.¹²³ Notwithstanding this, the Analyses noted the change in the post-September 11 international context and the call by the Security Council for UN members to become

¹¹⁹ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, International Convention for the Suppression of Terrorist Bombings*, para 10, *National Interest Analysis, International Convention for the Suppression of the Financing of Terrorism*, para 13, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 15, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 22.

¹²⁰ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, International Convention for the Suppression of Terrorist Bombings*, para 2, and *National Interest Analysis, International Convention for the Suppression of the Financing of Terrorism*, para 2.

¹²¹ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, International Convention for the Suppression of Terrorist Bombings*, para 2, *National Interest Analysis, International Convention for the Suppression of the Financing of Terrorism*, para 2, and *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 2, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 2.

¹²² Above n 55.

¹²³ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 2, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 4.

party to all anti-terrorism conventions¹²⁴ as sound bases for New Zealand becoming a party to the conventions.¹²⁵

The Foreign Affairs, Defence and Trade Committee duly met to consider each treaty and NIA, as required.¹²⁶ In each case, the Committee reported to the House, attaching a copy of the relevant NIA, and simply advising that it had conducted an examination of the treaty in question and had no matters to bring to the attention of the House.¹²⁷ This completed the first (preparatory and consultative) step in the implementation process for each treaty.

In the second phase of implementation, legislation was prepared and introduced to the House. For the purpose of the bombing and financing conventions, this was through the Terrorism (Bombings and Financing) Bill, introduced in early 2001, which ultimately became the Terrorism Suppression Act 2002. This is discussed in detail below.¹²⁸ The Counter-Terrorism Bill, introduced in April 2002, was the vehicle through which the obligations under the plastic explosives and nuclear materials

¹²⁴ Resolution 1373, above n 57, para 3(d).

¹²⁵ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 2, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, paras 5 and 7.

¹²⁶ See Parliamentary Standing Orders 382(3), 384 and 385.

¹²⁷ The latter question being a decision of the Committee under Parliamentary Standing Order 385(2). For the reports of the Committee, see New Zealand Foreign Affairs, Defence and Trade Committee, *Report on International Treaty Examination of the Convention for the Suppression of Terrorist Bombing*, presented to the House 1 December 2000, *Report on International Treaty Examination of the Convention for the Suppression of the Financing of Terrorism*, presented to the House 1 December 2000, *Report on International Treaty Examination of the Convention on Marking of Plastic Explosives for the Purpose of Identification*, presented to the House 22 February 2002, and *Report on International Treaty Examination of the Convention on the Physical Protection of Nuclear Material*, presented to the House 22 February 2002.

¹²⁸ Discussed at 3.11 *Terrorism Suppression Act 2002*.

conventions were incorporated. The Counter-Terrorism Act 2003 is also discussed below.¹²⁹

As a result of the legislation mentioned, the final process was completed in New Zealand's post-September 11 counter-terrorist treaty-making. The Convention for the Suppression of Terrorist Bombing was acceded to on 4 November 2002 and the International Convention for the Suppression of the Financing of Terrorism was ratified by New Zealand on the same day. The Convention on the Physical Protection of Nuclear Material and the Convention on the Marking of Plastic Explosives for the Purpose of Detection were both acceded to on 21 September 2004.

3.5 Summary: Transformation of New Zealand's International Terrorism Obligations

Evident through the discussion to this point of the chapter is that the interface between international and municipal law is a complex one at the best of times, added to in the context of counter-terrorism by resolutions of the UN General Assembly and Security Council. By way of summary, the following can be said about the application and/or incorporation of New Zealand's international counter-terrorist obligations:

- Article 13(2) of the First Protocol to the Geneva Conventions contains a prohibition against acts or threats of violence intended to spread terror amongst the civilian population. Although New Zealand has not incorporated this prohibition within the Geneva Conventions Act 1958, the prohibition is applicable at domestic law as being reflective of customary international law (which requires no act of transformation).

¹²⁹ Discussed at 3.12 *Counter-Terrorism Act 2003*.

In practical terms, however, the prohibition is limited in application to international armed conflicts and its only potential impact upon New Zealand courts might be through informing the interpretation of counter-terrorist legislation consistently with the prohibition.

- According to New Zealand's reports to the Counter-Terrorism Committee, the non-binding directions of Security Council Resolutions 1269 and 1373 have been, and continue to be, complied with through the diplomatic, legal, financial, humanitarian, intelligence and military activities of the New Zealand State.
- The binding directions under paragraphs 1 and 2 of Security Council Resolutions 1373 have, also according to New Zealand's reports, been implemented: (1) by way of interim measure, through the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and Amending Regulations; and (2) permanently, through the Terrorism Suppression Act 2002.
- The resolutions of the General Assembly, adopting, reiterating and expanding upon the Assembly's Declaration on Measures to Eliminate International Terrorism are not binding upon New Zealand in and of themselves. It is possible that they *might* be reflective of customary international law, in which case the principles within the Declarations are applicable at domestic law. The reality, however, is that the principles reflect matters addressed either through Security Council resolutions or within a number of the international conventions on terrorism, and therefore add little to the domestic law debate.

- The twelve international treaties on terrorism have been incorporated into New Zealand law through the Aviation Crimes Act 1972, the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980, the Maritime Crimes Act 1999, the Terrorism Suppression Act 2002 and the Counter-Terrorism Act 2003.

What follows from this point is an examination of the items of domestic legislation identified as incorporating New Zealand's international obligations on counter-terrorism. This examination, considering each item of legislation in chronological order, is aimed at achieving three things. First, an overview of the nature and operation of the legislation will be provided. Next, an analysis will be conducted on whether each item of legislation in fact transforms into domestic law the international obligations it purports to incorporate. Finally, examination of the legislation seeks to identify provisions that might impact upon human rights.

As well as examining the legislation which incorporates New Zealand's counter-terrorism obligations, consideration will be had to the International Terrorism (Emergency Powers) Act 1987. The rationale for doing so is that, even though this legislation is not an incorporating Act, it is nevertheless directly targeted at countering and responding to terrorist acts.

PART B: DOMESTIC INCORPORATING LEGISLATION

Having outlined the means by which New Zealand has acted to implement its international counter-terrorist obligations, this part of the chapter considers the various items of legislation through which implementation has occurred. As indicated, this part will provide an overview and explanation of seven items of domestic legislation: the Aviation Crimes Act 1972; the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980; the International Terrorism (Emergency Powers) Act 1987; Maritime Crimes Act 1999; the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001; the Terrorism Suppression Act 2002; and the Counter-Terrorism Act 2003. In the course of doing this, provisions or features of this legislation that have the *potential* to impact upon civil and political rights will be highlighted, thus identifying the nature of issues to be considered within Chapter Six onwards of this thesis. It should be emphasised that this Chapter only sets out to identify potential issues. The proper examination of the content of rights and limits is left for Part Two of the thesis.¹³⁰

3.6 Aviation Crimes Act 1972

The Aviation Crimes Act 1972 was the vehicle through which New Zealand transformed its obligations under the four conventions concerning

¹³⁰ Discussed at 3.14 Potential Civil and Political Rights Issues.

the safety of aviation, its preamble stating that it is:

An Act to give effect to the provisions of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, and the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, and for matters incidental thereto.

The Act contains 21 sections and establishes the following offences relating to aircraft and international airports:

- *Hijacking*,¹³¹ being the unlawful seizure of, or exercise of control over, an aircraft (while on board an aircraft “in flight”, which is from the time when all the aircraft’s external doors are closed after embarkation until any external door is opened for disembarkation)¹³² by force, intimidation or threat of force, whether in or outside New Zealand.¹³³ Conviction on indictment renders a person liable to life imprisonment.¹³⁴
- *Crimes in connection with hijacking*,¹³⁵ which includes any act or omission that is an offence under New Zealand law and occurs while on board an aircraft in flight and “in connection with the crime of hijacking”.¹³⁶ Section 4(2) deems such a connection to exist when the

¹³¹ Offences mandated by articles 1(a) and 2 of the Hague Convention.

¹³² This is in fact a wider definition than that provided under the Tokyo Convention, which provides under Chapter I, article 1(3) that “For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends”. The broader definition found in the Aviation Crimes Act is found, however, within Chapter III of the Convention, article 5(2); article 3(1) of the Hague Convention; and article 2(a) of the Montreal Convention.

¹³³ The offence is created under section 3 of the Act. The term “in flight” is defined by section 2(2) of the Act.

¹³⁴ Section 3.

¹³⁵ Offences mandated by article 1(b) of the Hague Convention, above n 94.

¹³⁶ Section 4(1). Section 4 does not itself specify the maximum penalty for such offending.

conduct facilitates a hijacking or is intended to avoid the detection or arrest of any person connected with the hijacking.

- *Crimes relating to aircraft*,¹³⁷ being a list of specific offences under section 5 of the Act relating to conduct affecting an aircraft in flight or “in service” (as defined by section 2(3)). The offences relate to conduct that might damage an aircraft or otherwise put it at risk.
- *Crimes relating to international airports*,¹³⁸ which again sets out a list of specific offences concerning the use of any “device, substance or weapon” which endangers the safety of an international airport through violence, damage of facilities or aircraft not in service, or disruption of services.¹³⁹

The commission of any of these offences renders a person liable to prosecution under New Zealand law or, in the alternative, liable to extradition in accordance with the procedures under the Extradition Act 1999.¹⁴⁰

The Aviation Crimes Act also makes it an offence to take firearms, dangerous or offensive weapons or instruments, ammunition, or any explosive substance or device onto an aircraft without lawful authority or reasonable excuse.¹⁴¹

In terms of compliance with obligations, the Tokyo Convention requires contracting States to take measures necessary to establish jurisdiction over offences committed on board aircraft registered in their

¹³⁷ Offences mandated by article 1(2) of the Tokyo Convention and article 1 of the Montreal Convention, above n 92 and 95.

¹³⁸ Offences mandated by article 2(1) of the Montreal Protocol, above n 97.

¹³⁹ Section 5A.

¹⁴⁰ Sections 7 and 7A.

¹⁴¹ Section 11, punishable by a maximum of 5 years' imprisonment.

State.¹⁴² The more specific obligations imposed under the Tokyo Convention appear to have been fully implemented through sections 5 (offences), 15 to 17 inclusive (powers of the aircraft commander) and 19 (exemption of military, customs or police services) of the Aviation Crimes Act.

The Hague Convention, concerning the hijacking of aircraft, requires States parties to make hijacking an offence punishable by severe penalties.¹⁴³ Again, the requirements of the convention appear to have been fully implemented. The position is also true of the Montreal Convention and its Protocol.

Sections 12 and 13 of the Act set out powers of search of passengers, baggage and cargo. Since search and seizure is a matter specifically addressed within both the International Covenant on Civil and Political Rights¹⁴⁴ and the New Zealand Bill of Rights Act 1990, further consideration of these provisions will be had.¹⁴⁵

Security of the person is also a matter impacted upon by the Aviation Crimes Act, an aircraft commander holding powers of search and restraint under sections 15 and 17.¹⁴⁶ Related to the powers of restraint are the provisions of articles 6 to 10 and 13 to 15 inclusive of the Tokyo Convention, and article 6 of the Hague Convention.

¹⁴² Article 3(2).

¹⁴³ Article 2.

¹⁴⁴ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁴⁵ Chapter Nine.

¹⁴⁶ Also to be addressed within Chapter Nine.

3.7 Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980

The Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980 incorporates the two treaties on terrorism concerning the safety of persons, as well as the Convention on the Safety of United Nations and Associated Personnel. Its preamble reads:

An Act to give effect to–

- (a) The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973; and
 - (b) The Convention Against the Taking of Hostages 1979; and
 - (c) The Convention on the Safety of United Nations and Associated Personnel 1994;–
- and for matters incidental to the implementation of those Conventions.

This discussion focuses on the first two conventions, identified within the Act as the 1973 and 1979 Conventions, as terrorism-related conventions identified by the Terrorism Prevention Branch. The Act establishes three categories of offending:

- *Hostage-taking*,¹⁴⁷ defined as the unlawful seizure or detention of any person, whether in or outside New Zealand, with intent to compel the government of any country or any international intergovernmental organisation to do or abstain from doing something.¹⁴⁸ Section 8(2) excludes conduct that would essentially amount to the domestic-based offence of kidnapping.

¹⁴⁷ As mandated by article 1 of the International Convention against the Taking of Hostages, above n 102.

¹⁴⁸ Section 8(1).

- *Crimes against persons protected by a convention*,¹⁴⁹ which includes conduct in or outside New Zealand in relation to a person who is known to be a protected person that would amount to certain crimes listed in the first Schedule to the Act (section 3), or threats of such conduct (section 5).¹⁵⁰
- *Crimes against premises or vehicles of persons protected by a convention*,¹⁵¹ again including conduct within or outside New Zealand this time in relation to the official premises of, or vehicles used by, protected persons that would amount to certain crimes listed in the second Schedule to the Act (section 4), or threats of such conduct (section 6).¹⁵²

As for the Aviation Crimes Act, any offence against the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act renders an offender liable to prosecution in New Zealand or, in the alternative, to extradition. To that end, the international obligations under the two conventions identified as relating to terrorism,¹⁵³ appear to have been fully implemented into national law. There do not appear to be any issues of potential concern relating to civil and political rights within the 17 sections of the Act.

¹⁴⁹ As mandated by article 1(a), (c), (d) and (e) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, above n 100.

¹⁵⁰ Including homicide, violent offending, sexual offending and kidnapping.

¹⁵¹ As mandated by article 1(b), (c), (d) and (e) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, above n 100.

¹⁵² Arson, attempted arson, intentional damage and endangering transport – sections 267, 268, 269 and 270 respectively of the Crimes Act 1961.

¹⁵³ The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention against the Taking of Hostages, above n 102.

3.8 International Terrorism (Emergency Powers) Act 1987

The International Terrorism (Emergency Powers) Act 1987 is an Act adopted by New Zealand in direct response to the Rainbow Warrior bombing, rather than in response to international counter-terrorist obligations, and in the realisation that New Zealand was not safe from terrorist activity within its borders.¹⁵⁴ In the Parliamentary debates concerning the Bill, the then Minister of Justice Geoffrey Palmer said:¹⁵⁵

Sadly, it can no longer be assumed that New Zealand will remain immune from acts of international terrorism.

The Act establishes emergency powers, which can be authorised by a meeting of at least three Ministers of the Crown if they reasonably believe (based on advice to the Prime Minister from the Commissioner of Police) that an international terrorist emergency is occurring and that the exercise of emergency powers is necessary to deal with that emergency.¹⁵⁶ This authority must be given by way of a notice in writing (within the terms specified under section 6(3)) and tabled before the House of Representatives with reasons for giving the notice.¹⁵⁷ The House then has the authority to either revoke the notice or, if necessary, to extend it at any time and for any reason.¹⁵⁸ The emergency authority otherwise remains valid for seven days, unless extended by a resolution of Parliament under

¹⁵⁴ Although it should be recognised that not all agreed at the time that this was the case and that specific anti-terrorism legislation was necessary: see, for example, New Zealand Human Rights Commission, *Report on the International Terrorism (Emergency Powers) Bill 1987*, 1987.

¹⁵⁵ New Zealand, *New Zealand Parliamentary Debates*, No 482, 10115, 30 June 1987.

¹⁵⁶ Sections 5 and 6.

¹⁵⁷ Section 7. The notice must be tabled immediately if the House is at that time sitting, or otherwise at the earliest practicable opportunity – section 7(1).

¹⁵⁸ Sections 7(2) and 8.

section 7(2) of the Act – each resolution only enabling an extension of a maximum of seven days.

Where an international terrorist emergency is declared, certain emergency powers are vested in the police under section 10 of the Act, also exercisable by members of the armed forces acting as an aid to the civil power and where requested to act by a member of the police:¹⁵⁹

- (2) Subject to this Act, any member of the Police may, for the purpose of dealing with any emergency to which this section applies, or of preserving life or property threatened by that emergency,—
 - (a) Require the evacuation of any premises or place (including any public place), or the exclusion of persons or vehicles from any premises or place (including any public place), within the area in which the emergency is occurring:
 - (b) Enter, and if necessary break into, any premises or place, or any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle, within the area in which the emergency is occurring:
 - (c) Totally or partially prohibit or restrict public access, with or without vehicles, on any road or public place within the area in which the emergency is occurring:
 - (d) Remove from any road or public place within the area in which the emergency is occurring any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle impeding measures to deal with that emergency; and, where reasonably necessary for that purpose, may use force or may break into any such aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle:
 - (e) Destroy any property which is within the area in which the emergency is occurring and which that member of the Police believes, on reasonable grounds, constitutes a danger to any person:
 - (f) Require the owner or person for the time being in control of any land, building, vehicle, boat, apparatus, implement, or equipment (in this paragraph referred to as requisitioned property) that is within the area in which the emergency is occurring forthwith to place that requisitioned property under the direction and control of that member of the Police, or of any other member of the Police:
 - (g) Totally or partially prohibit or restrict land, air, or water traffic within the area in which the emergency is occurring.
- (3) Notwithstanding anything in any other Act, but subject to this Act, any member of the Police may, for the purpose of preserving life threatened by any emergency to which this section applies,—

¹⁵⁹ Section 12.

- (a) Connect any additional apparatus to, or otherwise interfere with the operation of, any part of the telecommunications system; and
- (b) Intercept private communications—
in the area in which the emergency is occurring.

The latter power of interception is exercisable by police only.¹⁶⁰ The Act also provides an emergency power to requisition any property, with compensation later payable to the owner of the property.¹⁶¹ The powers thus far have the potential to impact upon rights pertaining to search and seizure, detention and privacy. Added to this is the exemption from liability of the police or members of the armed forces exercising powers under the Act.

Perhaps most controversial is section 14 of the Act which allows the Prime Minister to restrict or prohibit the publication or broadcasting of the identity (or any information capable of identifying) of any person involved in dealing with an international terrorist emergency, as well as restricting or prohibiting information about any piece of equipment used to deal with the emergency that could prejudice measures used to resolve an international terrorist emergency.¹⁶² In effect these powers could be used for a ban on all media for up to twenty-one days. Criticisms that the censorship provisions amounted to an unjustified encroachment on the right to freedom of expression¹⁶³ led to the New Zealand Law Commission

¹⁶⁰ Section 10(4).

¹⁶¹ Sections 11 and 13.

¹⁶² The section, its triggering provisions, and effect are considered in Chapter Eight.

¹⁶³ Discussed in the report of the Advisory Council of Jurists, *Reference on the Rule of Law in Combating Terrorism*, Final Report to the Asia Pacific Forum of National Human Rights Institutions, May 2004, 116.

to recommend that the Act be repealed.¹⁶⁴ The Act remains in force without amendment.

The Act also creates offences for failure to comply with directions issued by police or military under the powers under section 10,¹⁶⁵ or for breach of a section 14 media gag.¹⁶⁶

A “terrorist emergency” is defined under the Act as:

Section 2 Interpretation

“International terrorist emergency” means a situation in which any person is threatening, causing, or attempting to cause—

- (a) The death of, or serious injury or serious harm to, any person or persons; or
 - (b) The destruction of, or serious damage or serious injury to,—
 - (i) Any premises, building, erection, structure, installation, or road; or
 - (ii) Any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle; or
 - (iii) Any natural feature which is of such beauty, uniqueness, or scientific, economic, or cultural importance that its preservation from destruction, damage or injury is in the national interest; or
 - (iv) Any chattel of any kind which is of significant historical, archaeological, scientific, cultural, literary, or artistic value or importance; or
 - (v) Any animal—
- in order to coerce, deter, or intimidate—
- (c) The Government of New Zealand, or any agency of the Government of New Zealand; or
 - (d) The Government of any other country, or any agency of the Government of any other country; or
 - (e) Any body or group of persons, whether inside or outside New Zealand,—
- for the purpose of furthering, outside New Zealand, any political aim.

There are two main things to note about this definition. Although, at first sight, it appears to be detailed, it is in fact relatively broad. A wide range of criminal conduct, accompanied by coercive or intimidatory elements,

¹⁶⁴ Keith K, *Final Report on Emergencies* (New Zealand Law Commission Report 22, 1991), para 7.139. The Commission’s recommendations are discussed when considering the impact and legitimacy of sections 14 and 15 of the Act within Chapter Eight.

¹⁶⁵ Section 21(1)(a), qualified by the defences under subsection (4).

¹⁶⁶ Section 21(1)(b), qualified by the defences under subsection (4).

will satisfy the definition and might thereby invoke the powers discussed. The second aspect of the definition to note is the final sentence, which qualifies that the conduct in question is done for the purpose of furthering any political aim *outside New Zealand*. In other words, if a bombing (or other criminal act) was committed with the aim of changing the New Zealand Government's policy and/or conduct within New Zealand, this would not give rise to an "international terrorist emergency". The reasoning must be that this would be "national" rather than "international", although it is not clear why the State should want to have emergency powers to deal with international terrorists and not domestic ones. In considering this point in its report on emergencies, the New Zealand Law Commission described the distinction between international and internal terrorism as being unsustainable.¹⁶⁷ Pointing to the 1976 report of Sir Guy Powels on the New Zealand Security Intelligence Service,¹⁶⁸ the Commission proposed that although international terrorism may pose the most likely threat against New Zealand, the possibility of a terrorist threat that has as its motive the furtherance of a political aim within New Zealand should not be discounted.¹⁶⁹

¹⁶⁷ Above n 164, para 7.82.

¹⁶⁸ Powels G, *Security Intelligence Service: Report by Chief Ombudsman*, AJHR 1976 A 3A, 31.

¹⁶⁹ Above n 164, para 7.81. Opposed to that, the New Zealand delegation to the Human Rights Committee (during the Committee's consideration of New Zealand's second periodic report under the International Covenant on Civil and Political Rights) explained that the International Terrorism (Emergency Powers) Act 1987 had been confined to international terrorism because that was a known reality, as opposed to 'home grown' terrorism (para 7.81): see *Concluding observations of the Human Rights Committee: New Zealand*, CCPR/A/44/40 (1989), para 372.

3.9 Maritime Crimes Act 1999

The two maritime safety conventions relating to terrorism were incorporated into New Zealand law through the final piece of pre-September 11 legislation, the Maritime Crimes Act 1999, being an Act:¹⁷⁰

...to give effect to the provisions of the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Rome Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

Similar in nature to the Aviation Crimes Act 1972, the Maritime Crimes Act establishes offences mandated by the Rome Convention and Protocol and aimed at securing the safety of ships (other than warships, customs or police vessels)¹⁷¹ and maritime platforms:

- *Crimes relating to ships*,¹⁷² prohibiting the unlawful seizure of ships and acts that damage ships or place their safe navigation in danger.¹⁷³

It also renders a person liable to prosecution if, in the commission of the latter acts, s/he injures or causes death to any person.¹⁷⁴

- *Crimes relating to fixed platforms*,¹⁷⁵ prohibiting the same conduct, but relating to fixed platforms (any artificial island, installation or structure permanently attached to the seabed for the purpose of exploration or resources exploitation).¹⁷⁶

¹⁷⁰ See the preamble to the Maritime Crimes Act 1999.

¹⁷¹ Section 3.

¹⁷² As mandated by article 3 of the Rome Convention, above n 105.

¹⁷³ Section 4(1) and (2).

¹⁷⁴ Section 4(2).

¹⁷⁵ As mandated by article 2 of the Rome Protocol, above n 106.

¹⁷⁶ As defined under section 2.

Such conduct, whether within or outside New Zealand,¹⁷⁷ renders a person liable to prosecution within New Zealand or arrest and surrender to a State party to the Rome Convention or Protocol, as applicable.¹⁷⁸

The Act also provides the master of a ship with powers of detention and surrender, as well as search and seizure, of any person on board a ship, incorporating the obligations under article 8 of the Rome Convention.¹⁷⁹ The Convention and Protocol are in all other respects implemented into New Zealand law. As rights of arrest and detention, as well as search and seizure, are involved, those provisions of the Act require further examination in the context of human rights.¹⁸⁰

3.10 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and Amending Regulations

As mentioned, the obligations imposed by the Security Council upon New Zealand under Resolution 1373 were, by way of interim measure, incorporated into domestic law under the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and Amending Regulations of 2002 – the Terrorism Regulations.¹⁸¹ The Terrorism Regulations were made pursuant to the empowering provision of the United Nations Act 1946, that provision established to permit the New Zealand Government to implement directions of the Security Council by Order in Council.

¹⁷⁷ See sections 8 and 9.

¹⁷⁸ Sections 13 to 16 inclusive.

¹⁷⁹ Sections 11 and 12.

¹⁸⁰ See below at 3.14 Potential Civil and Political Rights Issues.

¹⁸¹ Discussed at 3.3.1(b) *Binding obligations*.

The Terrorism Regulations did four things.¹⁸² First, they prohibited certain conduct relating to the financing of terrorist activities (the provision of funds to specified entities, the dealing with property of such entities and the making services and property available to entities).¹⁸³ The Regulations also imposed duties upon any person in possession or control of property suspected to be owned or controlled by a specified entity to report this to the police.¹⁸⁴ Third, the Regulations prohibited the recruitment of any person as a member of a specified entity, or the participation by any person in such an entity.¹⁸⁵ Finally, the Regulations identified al-Qaida, the Taliban and Usama bin Laden as “specified entities” under these Regulations.¹⁸⁶ The prohibitions potentially impact upon the freedom of association, to be discussed within Chapter Eight.

Quite apart from the prohibitions mentioned, the Terrorism Regulations also raise an interesting and complex issue concerning the relationship between the Executive and Parliament pertaining to subordinate law-making authority and the potential to limit rights. This matter, as indicated earlier, is addressed further within Chapter Six.

¹⁸² Gobbi M, “Treaty Action and Implementation”, (2004) 1 *New Zealand Yearbook of International Law* 277.

¹⁸³ Regulations 6, 7 and 9 of the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001.

¹⁸⁴ Regulation 8 of the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001. Regulation 8(2) excludes, from application of this duty, any “privileged communication” with a lawyer, as defined under the Financial Transactions Reporting Act 1996.

¹⁸⁵ Regulations 11 and 12 of the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001.

¹⁸⁶ Regulation 4(1) and 5 and the Schedule to the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001, and Regulation 3 of the United Nations Sanctions (Afghanistan) Amendment Regulations 2001.

3.11 Terrorism Suppression Act 2002

As indicated above, the Terrorism Suppression Act 2002 is an enactment passed to achieve two purposes: first to allow New Zealand to become party to the conventions on the suppression of terrorist bombings and the suppression of the financing of terrorism;¹⁸⁷ and also to give effect to obligations upon New Zealand under Security Council Resolution 1373.¹⁸⁸ Because of the timing of New Zealand's decision to pursue each objective, and the intervening attacks of September 11, the process from Bill to Act was a rather unusual one.

3.11.1 From Bill to the Current Act

As indicated, this piece of legislation has undergone a long and somewhat unusual transformation from its original form and content as the Terrorism (Bombings and Financing) Bill to the *current* form and content of the Terrorism Suppression Act 2002. The first two stages reflect the dual purposes of the legislation as noted above. First, the Bill was introduced as simple incorporating legislation for the bombings and financing conventions. Next, the Bill was significantly amended to incorporate obligations under Security Council Resolution 1373. A further set of substantive provisions were added to the Act through the Counter-Terrorism Act 2003 (which created the Terrorism Suppression Amendment Act 2003). Finally, the Terrorism Suppression Amendment Bill (No 2) was introduced in December 2004.

¹⁸⁷ Discussed at 3.4.4 *Legislative Incorporation Since September 11*.

¹⁸⁸ Discussed at 3.3.1(b) *Binding obligations*. See also Gobbi M, "Treaty Action and Implementation", (2004) 1 *New Zealand Yearbook of International Law* 260. Note that the Act does not contain any preambular statement setting out the purpose of the legislation, but that the purpose of the legislation is addressed within section 3 of the Act.

3.11.1(a) *Treaty implementation.* The Terrorism Suppression Act began its life as the Terrorism (Bombings and Financing) Bill, introduced in early 2001 (prior to the September 11 attacks) following the Executive's decision to become party to the International Convention for the Suppression of Terrorist Bombings¹⁸⁹ and the International Convention for the Suppression of the Financing of Terrorism.¹⁹⁰ As discussed, National Interest Analyses were prepared, with the Foreign Affairs, Defence and Trade Committee subsequently lodging treaty examination reports with the House on 1 December 2000.¹⁹¹ The reports did not bring any matters to the attention of the House, but the Analyses each noted that domestic implementing legislation would be needed to create new criminal offences, establish extra-territorial jurisdiction and facilitate the prosecution or extradition of alleged offenders.¹⁹²

3.11.1(b) *Security Council Resolution 1373.* After the preparation of the National Interest Analyses and the presentation of reports required by Parliamentary Standing Orders,¹⁹³ the horrific events of September 11, 2001, transpired. The Security Council subsequently adopted Resolution 1373,¹⁹⁴ imposing both binding and non-binding obligations upon New Zealand (as a member of the United Nations).¹⁹⁵ The Resolution was

¹⁸⁹ Above n 108.

¹⁹⁰ Above n 109.

¹⁹¹ Discussed at 3.4.4 *Legislative Incorporation Since September 11.*

¹⁹² New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, International Convention for the Suppression of Terrorist Bombings*, para 9, and *National Interest Analysis, International Convention for the Suppression of the Financing of Terrorism*, para 12.

¹⁹³ Discussed at 3.4.4 *Legislative Incorporation Since September 11* and 3.11.1 *Treaty Implementation.*

¹⁹⁴ Above n 57.

¹⁹⁵ Discussed at 3.3.1 *Resolutions of the Security Council.*

adopted when the Terrorism (Bombings and Financing) Bill was in its final stages of the select committee process.¹⁹⁶ Compliance with the obligations under the Resolution was the second aim of the Bill, as amended. To achieve that objective, the reasonably unusual step was taken of adding a considerable number of new substantive provisions to the Bill, seeing the Bill almost double in size.¹⁹⁷ Due to these circumstances, the Foreign Affairs Defence and Trade Committee presented to the House an interim report on the Bill, drawing to the attention of the House the new provisions in the Bill, with explanatory notes.¹⁹⁸ The Committee also called for public submissions on the draft amendments¹⁹⁹ and received 143 submissions from interest groups and individuals.²⁰⁰ In contrast, the Committee had received no submissions on the original Terrorism (Bombings and Financing) Bill.²⁰¹

3.11.1(c) *Counter-Terrorism Act 2003*. The next stage in the development of the Terrorism Suppression Act came through amendments to the legislation enacted under the Counter-Terrorism Act 2003. The latter legislation is discussed in more detail below, concerning the purpose of the legislation and the nature of legislative amendments achieved under that Act. What should be noted at this stage is that Part 2 of the Counter-Terrorism Act was directed towards amendment of the Terrorism

¹⁹⁶ See New Zealand's first report to the Counter-Terrorism Committee, above n 12, 3.

¹⁹⁷ As noted in New Zealand's first report, *ibid*.

¹⁹⁸ Foreign Affairs, Defence and Trade Committee, *Interim Report on the Terrorism (Bombings and Financing) Bill*, 8 November 2001.

¹⁹⁹ *Ibid*, cover page.

²⁰⁰ Foreign Affairs, Defence and Trade Committee, *Final Report on the Terrorism <(Bombings and Financing)> Suppression Bill*, 22 March 2002, 2.

²⁰¹ See the Committee's interim report, above n 195, 2.

Suppression Act. The primary purpose of these amendments was to incorporate obligations under the Convention on the Physical Protection of Nuclear Material and the Convention on the Marking of Plastic Explosives for the Purpose of Detection.²⁰² The amendments also add substantive provisions concerning the search and seizure, and related issues, by the Customs Service of goods owned or controlled by terrorist entities or associated persons.²⁰³

3.11.1(d) Terrorism Suppression Amendment Bill (No 2) 2004

On 14 December 2004, the most recent amending legislation was introduced to the House, the Terrorism Suppression Amendment Bill (No 2). The Bill seeks to do two things: create a new offence of providing financial support to all terrorist organisations (including those that might not yet be formally designated under the TSA); and extend the length of time that designations remain in force without further extension by High Court order (from three years to five).²⁰⁴

3.11.1(e) Attorney-General's advice. As will be discussed within Chapter Four, the New Zealand Bill of Rights Act 1990 (NZBORA) requires the Attorney-General to advise the House of any inconsistency between any provision of a Bill before the House and the NZBORA.²⁰⁵ In practical terms, this in turn relies on advice given to the Attorney-General by the New Zealand Crown Law Office. In the case of the Terrorism (Bombings

²⁰² Sections 10 to 14 and 16 to 23 of the Counter-Terrorism Act 2003.

²⁰³ Section 15 of the Counter-Terrorism Act 2003.

²⁰⁴ New Zealand Parliamentary Library, *Terrorism Suppression Amendment Bill (No 2) 2004*, Bills Digest No. 1204, 21 December 2004, 1.

²⁰⁵ New Zealand Bill of Rights Act 1990, section 7: see Chapter Four, 4.2.4 *Attorney-General's Scrutiny in the Enactment of Legislation*.

and Financing) Bill, the Solicitor-General examined the Bill²⁰⁶ and concluded that it was consistent with the Bill of Rights Act.²⁰⁷ That advice is considered in more detail within the later examination of civil and political rights issues.²⁰⁸

Reflecting this somewhat staggered development of the Terrorism Suppression Act, and the various objectives sought to be achieved under it, section 3 describes its purpose as being:

- (a) to make further provision in New Zealand law for the suppression of terrorism; and
- (b) to make provision to implement in New Zealand law New Zealand's obligations under—
 - (i) the Bombings Convention; and
 - (ii) the Financing Convention; and
 - (iii) the Anti-terrorism Resolution; and
 - (iv) the Nuclear Material Convention; and
 - (v) the Plastic Explosives Convention.

What follows is an overview of the nature, and concerns with, the Terrorism Suppression Act, including amendments made to it under Part 2 of the Counter-Terrorism Act.

3.11.2 Counter-Terrorist Framework under the Act

The Terrorism Suppression Act 2002 is a significant piece of legislation, containing 81 sections, five schedules and running to over 120 pages (in its amended form). It contains definitions of the term terrorism. It creates

²⁰⁶ As contained within the interim report of the select committee, above n 195.

²⁰⁷ Letter from the Solicitor-General to the Attorney-General, "re Terrorism Suppression Bill: Slip Amendments – PCO 3814B/11 Our Ref: ATT114/1048 (15)", 9 November 2001. It should be noted, as pointed out by the Solicitor-General in his letter, that his office was only provided with the Slip Amendments (which amended the original form of the Bill to incorporate the Resolution 1373 obligations) on the previous day, 8 November 2001.

²⁰⁸ See Chapters Seven (Terrorist Designations and Rights to Justice) and Eight (Democratic and Civil Rights).

offences and provides for associated issues of jurisdiction, prosecution and extradition. It establishes a process by which persons or entities may be designated as terrorists and contains various provisions aimed at suppressing the financing of terrorist activities.

3.11.2(a) Definition of "terrorist act". As discussed within Chapter Two, there has been no overwhelming consensus within the international community on a definition of terrorism, resulting in the lack of a definition within relevant Security Council and General Assembly resolutions.²⁰⁹ The result has been that individual States have been required to formulate their own definitions of the term. In the New Zealand context, this is addressed within sections 4 and 5 of the Terrorism Suppression Act.

Section 5 of the Act, combined with definitions contained within section 4(1) and conventions listed in Schedule 3, provides for three distinct types of "terrorist acts". The term is significant for two reasons.²¹⁰ It is linked to offences such as the financing of terrorist acts.²¹¹ It also plays a role in the designation of terrorist or associated entities, which include those entities that have perpetrated terrorist acts.²¹²

The first type of terrorist act defined reflects the international obligations assumed by New Zealand under the various international anti-terrorist conventions. Sections 4(1)²¹³ and 5(1)(b) prohibit acts that constitute an offence under one of the nine terrorism conventions listed in

²⁰⁹ Chapter Two, 2.1.1 *Attempts to Define Terrorism*, and 2.1.2 *Why a Lack of Consensus?*

²¹⁰ As highlighted in the Interim Report on the Bill, above n 195, 5.

²¹¹ Section 8, discussed at 3.11.2(b) *Offences*.

²¹² Discussed at 3.11.2(c) *Designation of "terrorist entities"*.

²¹³ Through its definition of "act against a specified terrorism convention" and "specified terrorism convention", and through the associated list of conventions contained in Schedule 3 to the Act.

Schedule 3 to the Act. Interestingly, Schedule 3 does not list the Convention for the Suppression of the Financing of Terrorism, the Convention on the Marking of Plastic Explosives for the Purpose of Detection, nor the Convention on Offences and Certain Other Acts Committed On Board Aircraft. In submissions to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill, the writer notified the Committee of this omission.²¹⁴ Clause 22 of the Counter-Terrorism Bill proposed to amend Schedule 3 to the Terrorism Suppression Act by including in the list of treaties the Convention on the Physical Protection of Nuclear Material. The author submitted to the Committee that this was not sufficient since, upon the enactment of the Counter-Terrorism Act, New Zealand was to become party to all twelve of the international conventions on counter-terrorism. The Terrorism Suppression Act should therefore include in its definition of a “terrorist act”, it was submitted, any act against *any* of those twelve conventions.²¹⁵ The Committee did not, however, recommend amendment of clause 22, nor did it report on the reasons for this.

The second type of terrorist act defined is that of terrorist acts in armed conflict. Sections 5(1)(c) and 4(1) make terrorist acts in armed conflict those:²¹⁶

- (a) that occurs in a situation of armed conflict; and
- (b) the purpose of which, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act; and

²¹⁴ Conte A, *Submissions to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill (27-1, 2003)*, 12 May 2003, part IIIA.

²¹⁵ Ibid, paras 23 and 24.

²¹⁶ As defined by section 4(1).

- (c) that is intended to cause death or serious bodily injury to a civilian or other person not taking an active part in the hostilities in that situation; and
- (d) that is not excluded from the application of the Financing Convention by article 3 of that Convention.

Finally, a more general (albeit complex) definition is provided within the balance of section 5. A terrorist act is:

- conduct intended to advance an ideological, political, or religious cause,²¹⁷
- *and* with the following intention:²¹⁸
 - (a) to induce terror in a civilian population; or
 - (b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act,
- *and* with the intention to cause:²¹⁹
 - (a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):
 - (b) a serious risk to the health or safety of a population:
 - (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):
 - (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:
 - (e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

²¹⁷ Section 5(2).

²¹⁸ Sections 5(2)(a) and (b).

²¹⁹ Section 5(3).

Notable in all definitions is that the three characteristics of “terrorism”, discussed in Chapter Two, are found:²²⁰ differential targeting; inducing fear or aiming to unduly compel an organisation or government; aimed at advancing an ideological, political, or religious cause.

A final point worth mentioning is that the three definitions each seem precise in their terms, and capable of adequate interpretation by the judiciary. This is an important point, since it is a recognised principle of human rights that definitions of criminal offences must be precise and unambiguous: *nullum crimen sine lege, nulla poena*.²²¹

3.11.2(b) *Offences*. The Act establishes the following offences:

- *Terrorist bombing*,²²² prohibiting the intentional and unlawful delivery, placement, discharge or detonation of an explosive or other lethal device with the intention to cause death (or serious injury) or extensive destruction. Of interest, the provision does not specify that such conduct be aimed at inducing fear or influencing an organisation or government, nor does it specify that this be for the advancement of any particular cause. It only holds one of the common characteristics of terrorism (targeting). If one considers the definition of the offence closely, however, it is not one of “terrorist bombing”, it is simply one of “bombing” where death or serious injury results, or where extensive

²²⁰ Chapter Two, 2.1.1 *Attempts to Define Terrorism*..

²²¹ For discussion on this point and its application to the definition of terrorism, see Andreu-Guzmán, *Terrorism and Human Rights*, (International Commission of Jurists, 2002), 213-215 and 249.

²²² Section 7.

damage to public facilities results. Conviction renders an offender liable to imprisonment for life.

- *Financing of terrorism*,²²³ prohibiting the wilful provision or collection of funds (directly or indirectly), intending (or knowing) that those funds are to be used to carry out a “terrorist act” (as defined above), without lawful justification or reasonable excuse. The maximum penalty, upon conviction, is 14 years’ imprisonment.

This prohibition is to be added to by the Terrorism Suppression Amendment Bill (No 2) 2004.²²⁴ The explanatory notes to the Bill refer to doubt that the current offence, just described, is enough to prohibit general financial support to an organisation involved in terrorism (whether designated or not), such as the payment of routine expenses (e.g., rent).²²⁵ In explaining the need for this, the Bills Digest and General Policy Statement for the Bill point to the requirement to comply with international standards set by the Financial Action Task Force on Money Laundering.²²⁶ Minister of Justice Phil Goff added:²²⁷

Given the fluidity of terrorist movements, and the unpredictable emergence of new terrorist groups, this change is the most workable way of ensuring that New Zealand will always remain

²²³ Section 8.

²²⁴ By creating an offence provision and amendment of the definition of the term “financing of terrorism” under section 2 of the Terrorism Suppression Act 2002 (through clauses 3 and 4 of the Bill).

²²⁵ New Zealand Ministry of Justice, *Terrorism Suppression Amendment Bill (No 2)*, *Government Bill, 242-1, Explanatory Note*, presented to the House 14 December 2005, 1. Clause 4 of the Bill proposes to create this offence through a new section 8(2A) of the Terrorism Suppression Act 2002.

²²⁶ Above n 204, 1.

²²⁷ Press Release, ‘Amendments to Tighten Terrorism Suppression Act’, URL <<http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=21825>> at 8 January 2005. New Zealand Ministry of Justice, *Terrorism Suppression Amendment Bill (No 2) 2004*, *Government Bill, 242-1, Explanatory Note*, presented to the House 14 December 2004, 2.

compliant with international obligations prohibiting the funding of terrorist organisations.

This may well be problematic in its application, since there will not be the same element of notice to the public as is achieved through the Gazetting of designations under the Act. Prosecution of such offending, where the entity is not designated, will have the added difficulty of establishing knowledge in the mind of the accused that the entity was a terrorist entity, within the terms of the Act.

- *Dealing with terrorist property*,²²⁸ making it an offence to deal with property known to be owned, controlled or derived by a “terrorist entity”,²²⁹ without lawful justification or reasonable excuse. Conviction renders a person liable to a maximum of seven years’ imprisonment. To “deal with” terrorist property:²³⁰
 - (a) means to use or deal with the property, in any way and by any means (for example, to acquire possession of, or a legal or equitable interest in, transfer, pay for, sell, assign or dispose of (including by way of gift) the property); and
 - (b) includes allowing the property to be used or dealt with, or facilitating the use of it or dealing with it.
- *Making property, or financial or related services, available*,²³¹ prohibiting the provision (direct or indirect) of any property, or any financial or related services, to (or for the benefit of) a terrorist entity, without lawful justification or reasonable excuse. Section 11 limits the operation of this prohibition, where the Prime Minister permits, by notice in writing, any particular dealing. Otherwise, the offence renders a convicted person liable to up to seven years’ imprisonment.

²²⁸ Section 9.

²²⁹ As designated, see below 3.11.2(c) *Designation of “terrorist entities”*.

²³⁰ Section 9(5).

²³¹ Section 10.

The terms “make available”²³² and “property”²³³ are defined within the Act, but the phrase “financial or related services” is not.

- *Recruiting members of terrorist groups*,²³⁴ making it an offence to recruit another person into an organisation or group, knowing that the organisation or group is either a “terrorist entity” or participates in “terrorist acts”. This is much broader in its scope than the previous three offences, since it goes beyond conduct relating to a “terrorist entity” as designated under the Act by also prohibiting conduct relating to entities that participate in “terrorist acts”. As seen already, there are three categories and definitions of terrorist acts under the combination of sections 4 and 5, the more general of which is reasonably complex.²³⁵
- *Participating in terrorist groups*,²³⁶ prohibiting participation in an organisation or group, knowing that the organisation or group is either a “terrorist entity” or participates in “terrorist acts” and for the purpose of enhancing the ability of the group to carry out terrorist acts. The maximum penalty is fourteen years imprisonment.
- *Harbouring or concealing terrorists*,²³⁷ making the intended assistance of a person to avoid arrest, escape custody, or avoid conviction an offence where it is known (or ought to be known) that the person has carried out, or intends to commit, a “terrorist act”. Seven years’ imprisonment can result from conviction.

²³² Section 10(6).

²³³ Section 4(1).

²³⁴ Section 12.

²³⁵ Discussed at 3.11.2(a) *Definition of “terrorist act”*.

²³⁶ Section 13.

²³⁷ Section 13A, added to the Terrorism Suppression Act by section 12 of the Counter-Terrorism Act 2003.

- *Using or moving unmarked plastic explosives*,²³⁸ prohibiting the possession, use, manufacture, importation or export of unmarked plastic explosives, except as allowed by the Hazardous Substances and New Organisms Act 1996 or by the Environmental Risk Management Authority. The maximum penalties are a fine of \$500,000 or imprisonment of no more than ten years.
- *Offences involving nuclear material*,²³⁹ prohibiting a range of conduct relating to nuclear material, including its importation and its use to intimidate.

3.11.2(c) *Designation of "terrorist entities"*. As seen from the foregoing discussion, a number of offences under the Terrorism Suppression Act concern conduct in support of or related to a "terrorist entity" or "associated entity". The Act establishes a regime by which organisations, groups, or even individuals may be designated as such. The designation process, governed by sections 20 to 42 inclusive, empowers the Prime Minister to designate terrorist entities based on information from the United Nations Security Council or "any relevant information, including classified security information".²⁴⁰

The Prime Minister may make an interim designation, after consulting with the Attorney-General and the Minister of Foreign Affairs and Trade, if s/he has good cause to believe that the entity has in the past undertaken one

²³⁸ Section 13B, added to the Terrorism Suppression Act by section 12 of the Counter-Terrorism Act 2003.

²³⁹ Sections 13C and 13D, added to the Terrorism Suppression Act by section 12 of the Counter-Terrorism Act 2003.

²⁴⁰ See sections 30 to 32 inclusive.

or more “terrorist acts” or is knowingly facilitating such acts.²⁴¹ An interim designation automatically expires after 30 days, during which time certain notice must be given about the designation.²⁴² The Act contemplates that a final designation, if appropriate, will be made prior to the expiry of the interim designation.²⁴³ Again, steps are required to notify and, in addition, publish the designation.²⁴⁴

A final designation currently expires after three years, unless the High Court extends the designation.²⁴⁵ The period of final designation is to be extended under the Terrorism Suppression Amendment Bill (No 2) 2004. To allow consideration of the Select Committee's review of the Terrorism Suppression Act (as required under section 70 of the Act),²⁴⁶ part of which will address the designation process, current designations are to continue for two years after presentation of the Committee's report to the House.²⁴⁷ Minister of Justice Phil Goff explained:²⁴⁸

At the time the original Bill was first introduced, there was uncertainty as to the nature and extent of the terrorism phenomenon. An assumption that some designations might be short-lived has since proved false.

He continued:²⁴⁹

Provisions in the existing Act mean that New Zealand's designations of terrorist organisations – including the 318 organisations listed by the United Nations Security Council – expire after three years unless renewed by order of the High Court.

²⁴¹ Section 20.

²⁴² Sections 21 and 26 to 29.

²⁴³ Section 22.

²⁴⁴ Section 23 and 26 to 29

²⁴⁵ Sections 23(g) and 35 to 41.

²⁴⁶ Discussed below at 3.11.3 *Review Mechanism*.

²⁴⁷ Due 1 December 2005, under section 70(3) of the Terrorism Suppression Act 2002.

²⁴⁸ Above n 227.

²⁴⁹ Ibid. See also the *Explanatory Note* to the Bill, above n 227, 2.

Drafting of that provision created the unintended need for each designation to be renewed individually, meaning it will be impossible to renew all the 318 UNSC-listed designations before they expire next October. That would put New Zealand in breach of Security Council Resolution 1373 – which was passed unanimously by the UN in the wake of September 11 – and related resolutions.

Both the interim and final designation processes are open to judicial review.²⁵⁰ A designated entity may at any time apply to the Prime Minister to revoke the designation.²⁵¹

Currently, New Zealand has only designated as terrorist entities those identified by the United Nations 1267 Committee²⁵² in its most recent consolidated list.²⁵³ The failure by New Zealand to utilise this procedure for the designation of non-UN listed terrorist entities has been criticised as a failure by New Zealand to “add its considerable moral and symbolic voice to the international chorus against terrorist violence”.²⁵⁴

3.11.2(d) Forfeiture of terrorist property. In aiming to suppress the financing of terrorism, the Terrorism Suppression Act impacts upon both individuals and institutions in two ways. First, by the creation of offences (financing of terrorism, dealing with terrorist property, and making property, or financial or related services, available) and by the designation of individuals or groups as terrorist or associated entities (resulting in

²⁵⁰ Section 33.

²⁵¹ See sections 34 and 42.

²⁵² Formally known as the “Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities”.

²⁵³ See New Zealand's third report, above n 12, 4. The consolidated list is available at URL <<http://www.un.org/Docs/sc/committees/1267/tablelist.htm>>. For more details, see also New Zealand's report to the United Nations 1267 Committee, above n 28, 2-4.

²⁵⁴ Smith JE, *New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities*, Ian Axford New Zealand Fellowship in Public Policy, December 2003, 3.

prohibited dealings with such entities as a result of the offences just mentioned). The second means by which the Act seeks to suppress the financing of terrorist activities is through the establishment of a financial transactions reporting regime and providing for the forfeiture of terrorist property. The power of forfeiture is one vested in the High Court under section 55 of the Terrorism Suppression Act, allowing the Attorney-General to apply for an order for forfeiture in respect of property owned by an entity in respect of which a final designation has been made and where the mere prohibition against dealing with such property²⁵⁵ is not enough, by itself.²⁵⁶

3.11.2(e) Financial transactions reporting. In terms of financial transactions reporting, section 43 of the Terrorism Suppression Act requires financial institutions and other persons in possession or control of suspected terrorist property to report that suspicion to the Police. The provision was enacted, explained the Select Committee, to ensure that the mere *holding* of terrorist property, without necessarily dealing in it, is detected and made unlawful.²⁵⁷ The process for reporting suspicious property is aligned with the process for reporting suspicious transactions in the Financial Transactions Reporting Act 1996, which is limited to reporting for the purposes of money laundering offences or for proceeds of crime action.²⁵⁸ “Double-reporting” is avoided by deeming a report under

²⁵⁵ Under the offences described, at 3.11.2(b) *Offences*.

²⁵⁶ See section 55(2)(b).

²⁵⁷ See the final report on the Bill, above n 200, 13.

²⁵⁸ Reporting under the Terrorism Suppression Act operates, however, independently of section 15 of the Financial Transactions Reporting Act – the latter Act being limited to reporting for the purposes of the investigation or prosecution of money laundering offences or for Proceeds of Crime Act action

the Terrorism Suppression Act to be notice under section 15 of the Financial Transactions Reporting Act.²⁵⁹

The provision applies to property directly, or indirectly, owned or controlled by any entity that has been designated a terrorist or associated entity. Two main points arise from that general statement of operation. Firstly, “property” is defined within the Act in such a way as to include any form of real or personal property or interest therein. Secondly, it applies to such property within the ownership or control of a “terrorist” entity, as designated, such designation resulting in public notification of both interim and permanent designations in the Gazette.²⁶⁰ There is, from that perspective, a small level of certainty for financial and other institutions in knowing the extent to which the reporting procedures apply: institutions need not bother themselves with the question of whether any particular organisation or person is a terrorist.²⁶¹ They will be informed of this through the Gazetted designation. However, the reporting procedures apply not only to property within the ownership or control of a “terrorist”

²⁵⁹ See sections 44(4) and 77 of the Terrorism Suppression Act and the (amended) section 15(1) of the Financial Transactions Reporting Act.

²⁶⁰ See sections 21(a), pertaining to interim designations, and 23(e) as to permanent designations. Upon permanent designation, such designation remains in force for a period of three years, unless earlier revoked or later extended by Court order: see section 35. Notification of revocation, expiry or invalidity is also subject to notification through the Gazette: see section 42.

²⁶¹ It has to be said, however, that the New Zealand Bankers' Association had in fact asked for an even greater level of notice to financial institutions when the Bill was being considered before the Select Committee. The Association requested that its members receive automatic direct notice of interim and final designations, thereby achieving a more effective reporting regime and ensuring that members did not unwittingly assist in the financing of terrorism through ignorance. See *Submissions by the New Zealand Bankers' Association to the Foreign Affairs, Defence and Trade Committee on the Terrorism <Bombings and Finance> Suppression Bill*, TERRO/133, Parliamentary Library, paragraph 2.2. By way of compromise, the Act contains a provision whereby the Prime Minister can direct that notice of designations be made to any persons or bodies that the Prime Minister thinks fit (see section 28(2)). No such directions have yet been made.

entity (section 43(1)(a)), but also to any property derived or generated from any such property (section 43(1)(b)). It will be interesting to see the extent to which the Government reviews, or even requires, compliance with these reporting provisions given their potentially wide application. It is suggested that if one was to apply the provisions to their full extent, such compliance would involve a level of financial regulation and investigation that is not commonly seen within New Zealand's deregulated environment.²⁶²

Once these preliminary issues are dealt with, it is then a question of what obligations are in fact imposed upon financial institutions. Having just made the criticism that proper compliance would be burdensome, this is countered by what is in the author's view a low threshold. The test for determining whether an institution is obliged to report to the Commissioner of Police is that of "suspicion, on reasonable grounds" that the institution is in possession or control of "property" within the jurisdiction of section 43.²⁶³ Of use, the OECD²⁶⁴ Financial Action Task Force on Money

²⁶² On that point, a high-level official within the New Zealand Ministry of Foreign Affairs and Trade advised the author of their view that New Zealand could, for that very reason, find itself receiving harsh criticism from the Organisation for Economic Co-operation & Development (OECD) Financial Action Task Force (which is in the process of consulting with member States on the suppression of terrorist financing).

²⁶³ See section 43(2). Where such suspicion exists, a report is to be made as soon as practicable in accordance with section 44 and Schedule 5 to the Act. Failure to report constitutes an offence under section 43(4) of the Act, punishable by up to one year's imprisonment. Note that section 43(2) does not require a lawyer to disclose any "privileged communication" (although the term is restricted somewhat by statutory definition in section 45). For a more detailed examination of the reporting provisions of the Terrorism Suppression Act, see Conte A, "New Challenges for Financial Regulation: The Suppression of the Financing of Terrorism" in *Essays in Commercial Law. A New Zealand Collection*, Centre for Commercial & Corporate Law Inc 2003, Hawes & Rowe (Eds.), 63.

²⁶⁴ Organisation for Economic Co-operation and Development, of which New Zealand is a member.

Laundering has issued guidelines on how financial institutions can detect terrorist financing.²⁶⁵

3.11.3 Review Mechanism

Following receipt of public submissions on the November 2001 version of the Terrorism (Bombings and Financing) Bill, the Foreign Affairs, Defence and Trade Committee recommended inclusion of a review mechanism pertaining to provisions through which Resolution 1373 was implemented.²⁶⁶ Now section 70 of the Terrorism Suppression Act, the mechanism requires a select committee to consider the operation of those provisions and whether they should be retained or amended.²⁶⁷ The review is to take place as soon as practicable after 1 December 2004, with the committee required to report to the House by no later than 1 December 2005.²⁶⁸

Of interest, neither section 70 nor the Select Committee recommendation for inclusion of the provision identify which provisions of the Terrorism Suppression Act are “provisions of this Act that are to implement New Zealand’s obligations under the Anti-terrorism Resolution”.²⁶⁹ This can, however, be gleaned through close examination of New Zealand’s reports to the Counter-Terrorism Committee in which

²⁶⁵ OECD Financial Action Task Force on Money Laundering, *Guidance for Financial Institutions in Detecting Terrorist Financing*, 24 April 2002.

²⁶⁶ See the Committee’s Interim Report, above n 195, 16.

²⁶⁷ Section 70(2).

²⁶⁸ Section 70(2) and (3).

²⁶⁹ Section 70(1).

New Zealand has had to report on how it has given effect to the provisions of Resolutions 1373:²⁷⁰

- Offences created under sections 8, 9, 10, 12, 13, 13A, 13B, 13C and 13D.
- The definition of the term “terrorist act”, through the combination of sections 4(1) and 5.
- The authority of the Prime Minister under section 11 to allow financial or related services to be provided to terrorist or associated entities.
- The designation process under sections 20 to 42 inclusive.
- The financial reporting obligations under sections 43 to 47.
- The terrorist property forfeiture provisions within sections 55 to 61 inclusive.

Interestingly, New Zealand's first report to the Counter-Terrorism Committee identifies compliance with paragraph 2(b) of Resolution 1373 as being achieved through legislation other than the Terrorism Suppression Act. This was to be the case, whereby amendments to the Crimes Act 1961 and Summary Proceedings Act 1957 (through the Counter-Terrorism Act 2003) created the authority to obtain interception warrants, warrants to attach tracking devices to persons or things, deterrence through more severe penalties, and requiring a computer owner or user to provide information to access data subject to security codes and the like.²⁷¹ Under section 70 of the Terrorism Suppression Act, however, those provisions

²⁷⁰ Discussed at 3.3.1(b) *Binding obligations*. See also New Zealand Parliamentary Library, *Counter-Terrorism Bill 2002*, Bills Digest No. 943, 4 February 2003, 3-5.

²⁷¹ Discussed at 3.12.3 *Parts 1 and 3 of the Counter-Terrorism Act*.

will not be the subject of review, since section 70 only requires the review of “provisions of this Act that are to implement New Zealand’s obligations under the Anti-Terrorism Resolution” [emphasis added].

3.11.4 Potential Civil and Political Rights Issues

The prohibition against the provision or collection of funds under section 8 of the Act may be seen as impacting upon one’s freedom of association, as is the prohibition against making property or services available under section 10. The prohibition against participation in groups or organisations under section 13 might also adversely impact upon this right.

Closer examination of the process by which a person or group can be designated a “terrorist entity” seems called for. Various aspects of the right to natural justice will be in issue in that regard, particularly concerning access by a designated person to information upon which the Prime Minister has based his or her decision and the consequent ability of a person to properly respond to an allegation of being a terrorist or associated entity. The use and status of classified security information will be particularly relevant in that regard.

3.12 Counter-Terrorism Act 2003

The Counter-Terrorism Act 2003 was also a multi-purpose piece of legislation: primarily enacted to allow New Zealand to become party to the plastic explosives and nuclear materials conventions;²⁷² to implement the

²⁷² Discussed at 3.4.4 *Legislative Incorporation Since September 11*. See also Foreign Affairs, Defence and Trade Committee, *Report on the Counter-Terrorism Bill, A Government Bill*, 27-2, *Commentary*, presented to the House 8 August 2003, 1.

remaining obligations under Security Council Resolution 1373;²⁷³ and to establish supplementary powers and investigative measures “designed to combat terrorism and address problems encountered by agencies in the investigation and enforcement of [terrorism-related] offences”.²⁷⁴

3.12.1 Purposes of the Counter-Terrorism Act

As indicated, the Counter-Terrorist Act was enacted to serve various purposes. Before considering those, and the status of the Act, it is notable to mention that the Counter-Terrorism Bill was also subject to scrutiny by the New Zealand Crown Law Office, inherent in the execution of the Attorney-General's function under section 7 of the Bill of Rights Act.²⁷⁵ Again, the Attorney-General was advised that there appeared to be no inconsistency between the Bill and the Bill of Rights Act.²⁷⁶

3.12.1(a) *Treaty implementation.* Within the scope of the first objective, to allow treaty accession, National Interest Analyses were presented to the House on 22 February 2002 with the accompanying reports of the Foreign

²⁷³ Foreign Affairs, Defence and Trade Committee, *Report on the Counter-Terrorism Bill, A Government Bill, 27-2, Commentary*, presented to the House 8 August 2003, 1.

²⁷⁴ Foreign Affairs, Defence and Trade Committee, *Counter-Terrorism Bill, A Government Bill, 27-1, Explanatory Note*, presented to the House 2 April 2003, 1. See also Foreign Affairs, Defence and Trade Committee, *Report on the Counter-Terrorism Bill, A Government Bill, 27-2, Commentary*, presented to the House 8 August 2003, 2. See also Gobbi M, “Treaty Action and Implementation”, (2004) 1 *New Zealand Yearbook of International Law* 265-266.

²⁷⁵ Just as the Terrorism (Bombings and Financing) Bill was: discussed above at 3.11.1(e) *Attorney-General's advice*.

²⁷⁶ Letter from Crown Counsel to the Attorney General, “re: Counter-Terrorism Bill PCO 4663/14 Our Ref: ATT114/1124 (15)”, 10 December 2002.

Affairs, Defence and Trade Committee.²⁷⁷ The Analyses noted that implementing legislation would need to create new criminal offences prohibiting the movement or use of unmarked plastic explosives and nuclear materials.²⁷⁸ The Counter-Terrorism Act achieves this through section 12 of the Act.²⁷⁹

The National Interest Analyses also considered the question of reporting, registration and monitoring obligations under the relevant treaties. It was noted that the transport safety standards within the Nuclear Materials Convention²⁸⁰ would not require implementation, since New Zealand had already incorporated International Atomic Energy Agency regulations, which are more stringent than those under the Nuclear Materials Convention.²⁸¹ The Analysis on the Plastic Explosives Convention²⁸² reported:²⁸³

A reporting and registration regime needs to be put in place adequately to control the existing stock of unmarked plastic explosives in New Zealand. This administrative function is already carried out in relation

²⁷⁷ Discussed at 3.4.4 *Legislative Incorporation Since September 11*. The Counter-Terrorism Bill was introduced on 17 December 2002: see Bills Digest No. 943, above n 270.

²⁷⁸ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 13, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 21.

²⁷⁹ Which, in turn, amended the Terrorism Suppression Act 2002 to become offences under sections 13B (use and movement of plastic explosives), 13C (physical protection of nuclear material) and 13D (importation and acquisition of radioactive material) of that Act. Note that the unlawful possession of nuclear material and nuclear explosive devices was already prohibited under New Zealand law under the Hazardous Substances and New Zealand Organisms Act 1996 and the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987.

²⁸⁰ Above n 55.

²⁸¹ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 20. Incorporation was effected through the Radiation Protection Act 1965.

²⁸² Above n 55.

²⁸³ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 14.

to other explosives under the Hazardous Substances and New Organisms Act 1996. Slight modifications to the operational procedures under that Act would be required to facilitate plastic explosives of the type covered by the Convention being captured by the tracking and reporting mechanisms of the HSNO Act.

The Counter-Terrorism Act did not, however, address this issue. To that extent, the plastic explosives reporting and registration regime has not been fully implemented into New Zealand law.²⁸⁴

3.12.1(b) Resolution obligations and investigative/supplementary powers.

The Explanatory Notes to the Counter-Terrorism Bill identify two further objectives of implementing the remaining obligations under Resolution 1373 and establishing investigative powers to assist in the detection of terrorists, terrorist acts and terrorist or associated entities. The reality, however, is that the latter objective supports the former objective. Within New Zealand's reports to the Counter-Terrorism Committee, New Zealand identifies the various new investigative powers as furthering New Zealand's compliance with Resolution 1373.²⁸⁵ The earlier consideration of the binding obligations under the Resolution disclose that the following provisions of the Counter-Terrorism Act (CTA) furthered compliance with the Resolution:

- Sections 4, 5, 33 and 34 of the CTA (pertaining to interception warrants, tracking devices and computer access – each discussed further below)²⁸⁶ were identified by New Zealand as adding to its compliance with paragraph 2(b) of the Resolution.

²⁸⁴ This is not an issue that will be explored any further, since it does not impact upon the question of the interface between counter-terrorism and human rights.

²⁸⁵ Discussed at 3.3.1(b) *Binding obligations*.

²⁸⁶ Discussed at 3.12.3 *Parts 1 and 3 of the Counter-Terrorism Act*.

- Creation of the offence of harbouring or concealing terrorists under section 12 of the CTA (discussed above)²⁸⁷ was said to add to New Zealand's compliance with Resolution 1373, paragraph 2(d).
- Sentencing directions under sections 30 and 31 of the CTA (discussed below)²⁸⁸ were in furtherance of the requirements of paragraph 2(e) of Resolution 1373.

3.12.2 Status of the Counter-Terrorism Act

What should be noted about this item of legislation is that it does not exist as an Act of Parliament with its own life. As introduced, the Bill was to become a stand-alone Act.²⁸⁹ Following submissions during the select committee process, however, its provision were instead incorporated into other extant legislation, namely:

- The Crimes Act 1961, under Part 1 of the Counter-Terrorism Act;
- The Terrorism Suppression Act 2002, including consequential amendments to the Mutual Assistance in Criminal Matters Act 1992, under Part 2 of the Counter-Terrorism Act; and
- The Misuse of Drugs Amendment Act 1978, the New Zealand Security Intelligence Service Act 1969, the Sentencing Act 2002, and the Summary Proceedings Act 1957, under Part 3 of the Counter-Terrorism Act.

What follows is an overview of the nature, and concerns with, amendments under Parts 1 and 3 of the Counter-Terrorism Act. Any similar issues

²⁸⁷ Discussed at 3.11.2(b) *Offences*.

²⁸⁸ Discussed at 3.12.3 *Parts 1 and 3 of the Counter-Terrorism Act*.

²⁸⁹ Advisory Council of Jurists, above n 163, 114.

relating to Part 2 have been discussed under the examination of the Terrorism Suppression Act.²⁹⁰

3.12.3 Parts 1 and 3 of the Counter-Terrorism Act

Reflecting the second and third stated purposes of the Counter-Terrorism Act, to further implement Resolution 1373 and to establish supplementary powers and investigative measures, Parts 1 and 3 of the Act amend the various items of legislation identified to achieve six main things:

- First, new terrorism-related offences were created under the Crimes Act 1961. New sections 298A, 298B and 307A make it an offence to cause disease or sickness in animals; contaminate food, crops, water or other products; or make threats of harm to people or property to achieve terrorist ends.²⁹¹ Associated provisions provide extraterritorial jurisdiction over these offences and restrict the ability to prosecute by requiring the consent of the Attorney-General.²⁹²
- The second feature of Parts 1 and 3 is to extend the ability of police to obtain warrants to intercept private communications relating to terrorist offences, by amending section 312 of the Crimes Act 1961 and section 26 of the Misuse of Drugs Amendment Act 1978.²⁹³
- Next, a new section 198B was inserted into the Summary Proceedings Act 1957, allowing police to demand assistance to access computer

²⁹⁰ Discussed at 3.11.2 *Counter-Terrorist Framework under the Act* and 3.11.3 *Potential Civil and Political Rights Issues*.

²⁹¹ Sections 6 and 7 of the Counter-Terrorism Act 2003.

²⁹² Sections 4 and 5 of the Counter-Terrorism Act 2003.

²⁹³ Sections 7B, 8 and 26 of the Counter-Terrorism Act 2003.

data by providing police with any data protection codes necessary to effect access to that data.²⁹⁴

- Fourth, the Summary Proceedings Act is further amended to authorise police or customs officers to obtain a warrant to attach a tracking device to any property or person where it is suspected that an offence has been, is being, or will be committed. The power, and restrictions thereon, is enacted through new sections 200A to 200O of the Summary Proceedings Act.²⁹⁵ Notably, the suspected offence is not limited to terrorism-related offences.²⁹⁶
- The fifth feature is a minor amendment of the New Zealand Security Intelligence Service Act 1969, with major potential effect.²⁹⁷ The amendment concerns the definition of the term “security” within the Act. Terrorism was already a matter within the ambit of the Act, but not in as wide terms as it is following the amendment in question. Prior to the Counter-Terrorism Act, “security” included the protection of New Zealand from acts of terrorism.²⁹⁸ The term now includes:²⁹⁹
 - (d) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act.

²⁹⁴ Section 33 of the Counter-Terrorism Act 2003.

²⁹⁵ Amendments effected under section 34 of the Counter-Terrorism Act 2003.

²⁹⁶ See section 200B(2) of the Summary Proceedings Act 1957. This is a matter discussed within Chapter Nine of this thesis.

²⁹⁷ Section 27 of the Counter-Terrorism Act 2003.

²⁹⁸ This was a matter included within the definition from 16 November 1977 through section 2(2)(b) of the New Zealand Security Intelligence Service Amendment Act 1977.

²⁹⁹ Section 2 of the New Zealand Security Intelligence Service Act 1969.

Interception and seizure warrants may be authorised for the purpose of detecting activities prejudicial to “security” or for the purpose of gathering foreign intelligence information essential to “security”.³⁰⁰

- Finally, the Sentencing Act 2002 is amended so that offending that forms part of, or involves, a terrorist act is to be treated as an aggravating feature under section 9 of that Act.³⁰¹ Where murder is committed as part of a terrorist act, section 104 of the Sentencing Act has been amended to provide for a minimum period of 17 years imprisonment for such offending.³⁰²

In terms of civil and political rights implications, three of the latter amendments clearly have the *potential* to have an impact: warrants to intercept private communications; and warrants to attach tracking devices to persons or property. Perhaps a little less clear, but equally important, is the new power of police to require assistance to access computer data, potentially impacting upon the privilege against self-incrimination.

3.13 Other Legislation?

As already indicated, there are numerous other pieces of legislation that add, to greater or lesser extents, to the body of New Zealand's “anti-terror” legislation. When referring to the Border Security Bill³⁰³ and the Maritime

³⁰⁰ Section 4 of the New Zealand Security Intelligence Service Act 1969.

³⁰¹ Section 30 of the Counter-Terrorism Act 2003.

³⁰² Section 31 of the Counter-Terrorism Act 2003.

³⁰³ Bill 53-2 introduced to Parliament on 18 June 2003. The Bill passed the second reading on 20 May 2004 but awaits the third reading (as at 1 December 2004).

Security Bill,³⁰⁴ by way of example, Customs Minister Rick Barker said this:³⁰⁵

[This] is part of a whole-of-government approach toward strengthening New Zealand's national security in the post-September 11 environment.

While such legislation does indeed act to strengthen national security and impacts upon counter-terrorism, this thesis restricts itself to consideration of the seven items of legislation identified. Those enactments and regulations are specifically targeted to New Zealand's compliance with international anti-terrorism obligations and with counter-terrorism within New Zealand. As will be seen next, they raise a considerable number of issues to be considered within the second part of this thesis.

3.14 Potential Civil and Political Rights Issues

The foregoing examination of New Zealand's domestic counter-terrorist legislation has drawn out various matters that call for further detailed consideration in the context of this thesis. Of the six sets of rights and freedoms contained within the New Zealand Bill of Rights Act,³⁰⁶ four main groups of issues come into play. The first, to be accurate, is not a right as such but involves an important constitutional question concerning the interface between Parliament and the Executive, with the potential to

³⁰⁴ Now the Maritime Security Act 2004, assented to on 5 April 2004.

³⁰⁵ New Zealand Government Press Release, 'Minister of Customs introduces Border Security Bill', 18 June 2003.

³⁰⁶ The New Zealand Department of Justice describes the Act as containing six main sets of rights, as relating to: life and security of the person; democratic and civil rights; non-discrimination and minority rights; search, arrest and detention rights; criminal procedure rights; and rights to justice. See New Zealand Department of Justice, "Chapter 4: New Zealand Bill of Rights Act 1990 and Human Rights Act 1993" in *Guidelines on Process & Content of Legislation*, 2001 edition URL <http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_4.html> at 4 January 2005.

adversely impact on all rights and freedoms. This first question involves the making of regulations under the United Nations Act 1946 and the balance between security and human rights. Second is a reasonably broad right, encompassing various procedural rights and notions of justice and fairness: the right to natural justice in the terrorist designation process. The third set of rights involves two first-generation civil rights: the freedoms of expression and association. The final set of issues affects criminal procedure rights and search, arrest and detention rights: privacy and surveillance; search and seizure; arrest and detention; and the privilege against self-incrimination.

Summarising the issues and provisions of concern within the thesis chapter numbers in which they will be dealt:

Chapter Six

The United Nations Act 1946 and the Safeguarding of Human Rights in Executive Law-Making

As regulations made under the United Nations Act 1946, the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 raise some interesting issues about potential conflicts between United Nations regulations and civil and political rights.³⁰⁷ Chapter Six will consider the regulations, and the empowering provision under the United Nations Act, and the mechanisms by which a balance can be achieved in that context between security and human rights (as well as the maintenance of the separation of powers doctrine).

³⁰⁷ Discussed at 3.10 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and Amending Regulations.

Chapter Seven

Terrorist Designations and Rights to Justice

The process by which a person or group can be designated a “terrorist entity” or “associated entity” under the Terrorism Suppression Act is one calling for careful examination.³⁰⁸ Various aspects of the right to natural justice will be in issue in that regard, particularly concerning access by a designated person to information upon which the Prime Minister has decided to make the designation and the consequent ability of a person to properly respond to an allegation of being a terrorist or associated entity. The use and status of classified security information will be particularly relevant in that regard, as will safety measures such as the ability and jurisdiction to revoke designations, judicial review and appeal.

Chapter Eight

Democratic and Civil Rights

Also identified within this chapter has been the ability of the Prime Minister to issue media gags under the International Terrorism (Emergency Powers) Act (sections 14 and 15), clearly impacting upon the right to freedom of expression, as guaranteed under article 19 of the ICCPR and section 14 of the Bill of Rights Act.³⁰⁹

A further issue arising out of the suppression of financing provisions of the Terrorism Regulations³¹⁰ and the Terrorism Suppression Act³¹¹ is that

³⁰⁸ Discussed at 3.11.2(c) *Designation of “terrorist entities”*.

³⁰⁹ Discussed at 3.8 International Terrorism (Emergency Powers) Act 1987.

³¹⁰ Discussed at 3.10 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and Amending Regulations.

³¹¹ Discussed at 3.11.2(b) *Offences*.

of the freedom of association. The right is again reflected within both the ICCPR (article 22) and the NZBORA (section 17). In particular:

- Regulation 6 of the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 prohibits the wilful collection or provision of funds, directly or indirectly, to specified entities.
- Regulation 7 of the same Regulations prohibits the dealing with any property that is known to be owned or controlled by specified entities.
- Regulation 9 makes it an offence to make property or financial services available to specified entities.
- Regulation 11 prohibits the recruitment of any person as a member of a specified entity.
- Regulation 12 outlaws the participation in a group or organisation, knowing that it is a specified entity.
- Section 8 of the Terrorism Suppression Act 2002 makes it an offence to provide or collect funds to or for specified entities.
- Section 10 of the latter Act makes it an offence to make property or services available to a specified entity.
- Section 12 makes it an offence to recruit another person into an organisation or group, knowing that the organisation or group is either a “terrorist entity” or participates in “terrorist acts”.
- Section 13 prohibits participation in an organisation or group that is either a “terrorist entity” or participates in “terrorist acts”.

- Section 13A criminalises the harbouring or concealing of a person, where it is known (or ought to be known) that the person has carried out, or intends to commit, a “terrorist act”.

Chapter Nine

Criminal Procedure Rights and Search, Arrest and Detention Rights

Within this final grouping, four sub-groups of rights will be examined: privacy and surveillance; search and seizure; arrest and detention; and the privilege against self-incrimination.

The right to privacy is one that lies at the core of the right to be free from unreasonable search and seizure. That specific right will be examined within Chapter Nine, as well as looking at privacy of the person, particularly concerning communications, as reflected within article 17 of the ICCPR and the Privacy Act 1993. Identified above as relevant to this are:

- Section 10(3) of the International Terrorism (Emergency Powers) Act, authorising the police to intercept private communications within an area in which an international terrorist emergency is occurring, with the qualifying provisions concerning use of such communications (sections 18 to 20 inclusive).³¹²
- Sections 7B, 8 and 26 of the Counter-Terrorism Act 2003, which extend the ability of police to obtain warrants to intercept private communications relating to terrorist offences (by amending section 312

³¹² Discussed at 3.8 International Terrorism (Emergency Powers) Act 1987.

of the Crimes Act 1961 and section 26 of the Misuse of Drugs Amendment Act 1978).³¹³

- It will be relevant, in the examination of the latter interception capabilities, to consider the principles set out in the Telecommunications (Interception Capability) Act 2004.³¹⁴
- Section 27 of the Counter-Terrorism Act 2003 amended the definition of “security” within the New Zealand Security Intelligence Service Act 1969 to include the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act. Section 4 of the latter Act authorises the issuing of interception and seizure warrants may be authorised for the purpose of detecting activities prejudicial to “security”.³¹⁵
- Section 34 of the Counter-Terrorism Act 2003 authorises police or customs officers to obtain a warrant to attach a tracking device to any property or person where it is suspected that an offence has been, is being, or will be committed (by adding new sections 200A to 200O of the Summary Proceedings Act).³¹⁶

Next, security of the person from unreasonable search and seizure is something guaranteed by both the International Covenant on Civil and Political Rights (article 17) and the New Zealand Bill of Rights Act 1990

³¹³ Discussed at 3.12.3 Parts 1 and 3 of the Counter-Terrorism Act.

³¹⁴ Discussed at 3.3.1(c) Non-binding directions.

³¹⁵ Discussed at 3.12.3 Parts 1 and 3 of the Counter-Terrorism Act.

³¹⁶ Discussed at 3.12.3 Parts 1 and 3 of the Counter-Terrorism Act.

(section 21). The following provisions will be considered within Chapter Nine, as ones that impact upon this right:

- Sections 12 and 13 of the Aviation Crimes Act 1972, which set out powers of search of passengers, baggage and cargo.³¹⁷
- Section 17 of the Aviation Crimes Act 1972, which confers upon an aircraft commander certain powers of persons on an aircraft.³¹⁸
- Section 10(2)(b), (d) and (e) of the International Terrorism (Emergency Powers) Act 1987, conferring upon police and military acting as an aid to the police various powers of entry into, or seizure or destruction of, property.³¹⁹
- Section 12 of the Maritime Crimes Act 1999, conferring upon a ship master and crew certain powers of search of a person or baggage on the ship.³²⁰

Arrested and detention are matters that strike at the heart of personal security and are impacted upon by various provisions of the ICCPR (articles 9 and 10) and the Bill of Rights (sections 22 to 24 inclusive). Chapter Nine will therefore examine:

- Section 15 of the Aviation Crimes Act 1972, which confers upon an aircraft commander certain powers of restraint and forced disembarkation.³²¹

³¹⁷ Discussed at 3.6.2 *Potential Civil and Political Rights Implications*.

³¹⁸ Ibid.

³¹⁹ Discussed at 3.8 International Terrorism (Emergency Powers) Act 1987.

³²⁰ Discussed at 3.9 Maritime Crimes Act 1999.

³²¹ Discussed at 3.6.2 *Potential Civil and Political Rights Implications*.

- Section 10(2)(a), (c) and (g) of the International Terrorism (Emergency Powers) Act 1987, conferring upon police and military acting as an aid to the police various powers of restricted entry and evacuation.³²²
- Section 11 of the Maritime Crimes Act 1999, authorising a ship captain to detain and surrender a person who commits an offence relating to ships (offences under section 4 of that Act).³²³

Finally, regard will be had to section 33 of the Counter-Terrorism Act 2003, through which a new section 198B was inserted into the Summary Proceedings Act 1957, allowing police to demand assistance to access computer data by providing police with any data protection codes necessary to access that data. The new power may potentially impact upon the long-held privilege against self-incrimination.³²⁴

3.15 Conclusion

An examination of New Zealand's counter-terrorist legislation is not as simple as one might first imagine. This chapter is evidence of that. Although the preceding chapter, Chapter Two, spent some time looking at the international anti-terrorism framework and the obligations that stem from that framework, this chapter has had to first consider the nature of those obligations and the means by which the obligations apply in domestic law and/or require acts of transformation. Through that examination it has been shown that the obligations upon New Zealand are effectively limited

³²² Discussed at 3.8 International Terrorism (Emergency Powers) Act 1987.

³²³ Discussed at 3.9 Maritime Crimes Act 1999.

³²⁴ Discussed at 3.12.3 *Parts 1 and 3 of the Counter-Terrorism Act*.

to ones that require transformation into municipal law through legislative action.

Six items of domestic legislation have been identified as the vehicles through which transformation has been effected: the Aviation Crimes Act 1972; the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980; Maritime Crimes Act 1999; the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001; the Terrorism Suppression Act 2002; and the Counter-Terrorism Act 2003. Although not an item of legislation enacted in response to international obligations, the International Terrorism (Emergency Powers) Act 1987 has also been identified as a document requiring consideration, since it is an item of legislation specifically addressing counter-terrorism and thereby complementing New Zealand's participating in the international agenda to suppress terrorism.

Examination of each item of legislation has revealed that New Zealand has, other than in some very minor and usually technical ways, fully implemented its international anti-terrorism obligations. By reviewing the structure and operation of each item of legislation, various provisions have been identified as having the potential to impact upon civil and political rights. In doing so, Chapters Two and Three have established important characteristics about the extant law on counter-terrorism. Further contributing to this first part of the thesis, the following chapter, Chapter Four, will consider the extant position on civil and political rights in New Zealand. The combination of Chapters Two to Four will be invaluable in

the analysis of issues within the second part of the thesis. By establishing the international and domestic law on counter-terrorism and human rights, part two of the thesis can consider their interface. Importantly, particular issues have been identified within this chapter for close examination within the second part. Additionally, the international and domestic policy considerations identifiable through this chapter will inform subsequent evaluations.

Chapter 4

Civil and Political Rights in New Zealand

In establishing the foundations for the examination of the interface between counter-terrorism and human rights, the previous two chapters have considered New Zealand's international counter-terrorist obligations, and the domestic implementation of those obligations. This chapter, the final in Part I of the thesis, looks at New Zealand's civil and political rights framework. In doing so, however, a focussed approach is adopted, limiting the scope of this chapter to consideration of the key issues that will be involved in the examination of the interface between human rights and counter-terrorism under Part II of this thesis, and to matters that go to the reasons for undertaking that examination.

Adopting that approach, this chapter starts with an overview of New Zealand's international human rights obligations and the domestic instruments through which human rights are protected in New Zealand. The chapter then seeks to answer three questions. First, why consider New Zealand's civil and political rights framework when examining its counter-terrorist legislation? Next, how are the International Covenant on Civil and Political Rights (ICCPR) and the New Zealand Bill of Rights Act 1990 (NZBORA) to be applied? Finally, how do the NZBORA and the ICCPR deal with the limitation of rights?

4.1 New Zealand's Civil and Political Rights Framework

Since the end of the Second World War, there has been a proliferation of international human rights treaties, with New Zealand now party to a significant number of those instruments.¹ The atrocious events of that war led, directly and naturally, to the establishment of the United Nations. With its primary mandate to create a cooperative and responsible international community, the United Nations set about establishing a body of multilateral treaties aimed at both protecting individuals and preventing a reoccurrence of the atrocities committed under the Nazi regime in Europe and the prisoner of war camps in Japan. A distinction has continued to develop between the concepts of human rights law and humanitarian law: the dichotomy is essentially between the declaration and protection of individual rights, and the imposition of duties upon individuals (largely imposed to prevent human rights abuses).

4.1.1 *The International Human Rights Regime*

Certain rights, seen as inherent to being human and having human dignity, were set out in the Universal Declaration of Human Rights.² Various further, and more specific, international human rights treaties flowed from this document. New Zealand is party to what are regarded to be the six

¹ At the turn of this Century, approximately 970 multilateral treaties and 717 bilateral treaties bound New Zealand: see Palmer G, "Human Rights and the New Zealand Government's Treaty Obligations" (1999) 29 *Victoria University of Wellington Law Review* 57, 58. It should be noted, of course, that the development of international human rights norms, and norms of international humanitarian law, substantially precede the establishment and work of the United Nations. Having said that, the common acceptance of the terminology of "human rights" (as opposed to its concept) was something that did develop since World War Two. See, for example, Ishay M, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, 2004).

² Adopted by the United Nations in 1948 under United Nations General Assembly Resolution 217(III) of 10 December 1948.

‘core’ human rights treaties stemming from the Universal Declaration.³

The most significant of those, at least for the purpose of this chapter, is the International Covenant on Civil and Political Rights (the ICCPR). The ICCPR consists of 27 articles enunciating a wide range of civil and political rights, from the right to self-determination, to freedom of speech and association, to minimum guarantees for the conduct of the criminal process.

Although the articulation of those rights is significant in itself, it is not just this aspect that makes the ICCPR an important human rights document. The ICCPR is the instrument through which the United Nations Human Rights Committee was established.⁴ The Committee has three functions, all linked to civil and political rights protection. The first of these is to receive and comment on periodic reports from States parties to the ICCPR.⁵ New Zealand has submitted four reports to the Human Rights

³ Those being: (1) the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), opened for signature 7 March 1966, 9464 UNTS 211 (entered into force 4 January 1969 and ratified by New Zealand in 1975); (2) the International Covenant on Civil and Political Rights (“ICCPR”), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 and ratified by New Zealand in 1978); (3) the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976 and ratified by New Zealand in 1978); (4) the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981 and ratified by New Zealand in 1984); (5) the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987 and ratified by New Zealand in 1989); and (6) the Convention on the Rights of the Child (CRC), opened for signature 20 November 1989, 1577 UNTS 43 (entered into force 2 September 1990 and ratified by New Zealand in 1993).

⁴ The Human Rights Committee was established under article 28(1) of the ICCPR.

⁵ See article 40(1) of the ICCPR. States parties are required to submit reports to the Human Rights Committee every five years, detailing the measures adopted to give effect to the rights recognised in the ICCPR and on the progress made in the enjoyment of those rights.

Committee under this procedure.⁶ Next, the Committee is empowered to make general comments, of its own volition, on any matter touching upon the rights set out in the ICCPR.⁷ Finally, and significantly in terms of the enforcement of rights, the Committee carries out a quasi-judicial function under the First Optional Protocol to the ICCPR, which establishes a complaints procedure.⁸ The Optional Protocol gives individuals within States which are party to the Protocol the right of direct petition to the Human Rights Committee in certain well-defined circumstances.⁹ Of interest, although prior to the enactment of the NZBORA, Professor Jerome Elkind saw this mechanism as establishing within New Zealand a 'Bill of Rights' in itself and changing the helplessness of New Zealanders in the human rights arena.¹⁰ The NZBORA came into force five months later.

⁶ For the latest report by New Zealand to, and comments of, the United Nations Human Rights Committee, see Ministry of Foreign Affairs and Trade, *New Zealand's Fourth Periodic Report to the Human Rights Committee* (2001) CCPR/C/NZL/2001/4; and *Human Rights Committee Comments on New Zealand's 4th Periodic Report*, (2002) CCPR/CO/75/NZL.

⁷ General Comments by the Human Rights Committee are authorised by article 40(4) of the International Covenant on Civil and Political Rights. On reading that provision, it might appear that comments are limited to responses to specific periodic reports submitted by states party to the ICCPR. The Committee has adopted the practice, however, of making its comments open to all states parties and in more general terms, with the aim of assisting states with the interpretation and implementation of the Covenant. To view the general comments of the Committee, see URL <www1.umn.edu/humanrts/gencomm/hrcomms.htm>.

⁸ First Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976 and ratified by New Zealand in 1989).

⁹ For a comprehensive explanation of the communication procedure, see PR Ghandi, *The Human Rights Committee and the Right of Individual Communication* (Ashgate Dartmouth Publishing Ltd, 1998).

¹⁰ Elkind J "The Optional Protocol: A Bill of rights for New Zealand" [1990] NZLR 96, 101.

4.1.2 Legislative Implementation of International Human Rights Obligations in New Zealand

As discussed within Chapter Three, treaties are not law of the land unless incorporated by statute. This begs the question: given the number of international human rights treaty obligations adopted by the New Zealand Executive, which of those have been incorporated by statute and to what extent, therefore, are New Zealand's international human rights obligations reflected in domestic law? The question is important in order to determine what rights and freedoms are guaranteed, albeit that some may already find support through the common law.¹¹ For the purpose of this chapter and thesis, only the implementation of the ICCPR (governing civil and political rights) is considered.

When one talks of implementation, this can mean a number of things. It can mean that a treaty has been implemented in its entirety by a statute. This might be done by translating the terms of the treaty into domestic law or by annexing it to an Act of Parliament. The former can sometimes lead to imperfect implementation if there is a divergence between the text of the treaty and the text of the Act. Implementation is also achieved if, to all intents and purposes, the rules established by the treaty are already given effect to by existing law.¹² Alternatively, it might require modification of existing law.¹³

¹¹ That rights exist in the absence of legislation is implicitly accepted through the wording of the New Zealand Bill of Rights 1990: see ss2 ("rights affirmed") and 28 ("other rights not affected"). See also the discussion below at 4.1.5(b) *The affirmation of rights*.

¹² This was arguably the case when New Zealand ratified the two International Covenants in 1978 (the ICCPR and the International Covenant on Economic, Social and Cultural Rights) – i.e., those rights were arguably already being given effect to through various items of legislation, including the Race Relations Act 1971 and Human Rights Commission Act 1977. However, in response to New

There have been a number of statutes said to give effect to New Zealand's international human rights obligations under the ICCPR. The three major enactments are the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and the Privacy Act 1993.¹⁴ Through its preamble, the NZBORA declares itself as:

An Act - (a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

Similarly, the Human Rights Act provides in its long title that it is:

An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights.

Although the long title to the Privacy Act does not make explicit reference to obligations under the International Covenant, it does hold itself out as being an Act to establish principles concerning:¹⁵

- (i) The collection, use, and disclosure, by public and private sector agencies, of information relating to individuals; and

Zealand's Third Periodic Report to the UN Human Rights Committee, it is notable that the Committee expressed "regret" that some rights guaranteed by the ICCPR remained unrecognised (at least not expressed) by New Zealand law: Ministry of Foreign Affairs and Trade, *Human Rights in New Zealand. Report to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights*, Information Bulletin No 54, June 1995, Wellington, 69.

¹³ Aspects of the Crimes Act 1961, for example, were amended to give effect to the Convention Against Torture, and (more recently) to give effect to the Rome Statute of the International Criminal Court.

¹⁴ The Fourth Periodic Report to the HRC identifies the following additional enactments as creating the legislative structure within which human rights are protected in New Zealand: Ombudsman Act 1975, Official Information Act 1982, Privacy Act 1993, Police Complaints Authority Act 1988, Children, Young Persons and Their Families Act 1989, and the Health and Disability Commissioner Act 1994: above n 6, p 13 of the "Core Document".

¹⁵ See preambular paragraph (a) to the Privacy Act 1993. Note, also, that the long title does make reference to the recommendation of the Council of the OECD Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data.

- (ii) Access by each individual to information relating to that individual and held by public and private sector agencies; and

Those are clearly matters that bear upon the implementation of the right to privacy, as set out in article 17 of the ICCPR.¹⁶

4.1.3 The Human Rights Act 1993

The Human Rights Act (HRA) was enacted in 1993 to combine and extend the Race Relations Act 1971 and Human Rights Commission Act 1977. The original grounds of discrimination under the Race Relations Act and Human Rights Commission Act continue to be prohibited under the HRA through section 21(a) to (g): discrimination on the grounds of sex, marital status, religious belief, ethical belief, colour, race and ethnic or national origins. The 1993 Act also extends protection against discrimination on the grounds of disability, age, political opinion, employment status, family status and sexual orientation through section 21(h) to (m).¹⁷

Part II of the HRA sets out the conditions which are deemed to amount to “unlawful discrimination” in relation to employment, partnerships,

¹⁶ Article 17 of the International Covenant on Civil and Political Rights provides:
Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

It is not clear why article 17 was not implemented through the New Zealand Bill of Rights Act 1990. In the 1985 White Paper on a Bill of Rights for New Zealand, the implementation of New Zealand’s obligations under the International Covenant was identified as one of the reasons in favour of New Zealand adopting a Bill of Rights: see New Zealand Department of Justice, *A Bill of Rights for New Zealand - A White Paper* (Government Printer, Wellington, 1985), 30 (para 4.21). The paper then states that “some provisions of the Covenant do not appear in the draft”, but gives no explanation for this: para 4.23.

¹⁷ The ground of age is not, strictly speaking, a “new” ground of prohibited discrimination. It was in fact added to the Human Rights Commission Act 1977 in 1992 - see section 4 of the Human Rights Commission Amendment Act 1992.

membership in professional or trade associations, membership in qualifying bodies and vocational training bodies, access to facilities open to the public, the provision of goods and services to the public, the provision of land, housing and other accommodation and access to educational establishments.¹⁸ Additionally, section 65 of the Act (pertaining to indirect discrimination) is a catch all, prohibiting any policy or practice from having the effect of treating a person or group of persons differently on the basis of one of the prohibited grounds of discrimination, unless there is some “good reason”.

Through the linking provisions between the HRA and NZBORA,¹⁹ discriminatory conduct on the part of the State is also prohibited and subjects government to the discrimination complaints process under Part 3 of the Human Rights Act.

4.1.4 The Privacy Act 1993

The Privacy Act 1993 impacts upon the examination of issues concerning search and seizure, surveillance and access to personal information.²⁰ The relevance of the right to privacy upon these issues is something that has been seen, for example, within the jurisprudence of the UN Human Rights Committee.²¹

¹⁸ See sections 22, 36, 37, 38, 40, 42, 44, 53 and 57 of the Human Rights Act 1993.

¹⁹ See sections 3 and 19 of the New Zealand Bill of Rights Act 1990 and Part 1A of the Human Rights Act 1993 (inserted by the Human Rights Amendment Act 2001).

²⁰ See Chapter Nine (concerning surveillance and tracking devices).

²¹ For a detailed examination of the right under article 17 of the International Covenant on Civil and Political Rights, and its impact upon these matters, see Conte A, Davidson S and Burchill R, *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee* (Ashgate Publishing Ltd, 2004), chapter 7.

The Privacy Act was enacted on 17 May 1993 “to promote and protect individual privacy” in both the public and private sectors.²² Section 6 of the Privacy Act establishes 12 Information Privacy Principles, which are concerned with the collection, storage, use and disclosure of personal information. Personal information is defined, under section 2 of the Act, as “information about an identifiable individual”. The Act has been characterised as both a human rights statute and freedom of information statute.²³

The Act applies to the Crown, and any “agency” dealing with personal information.²⁴ In a way similar to the Human Rights Act, the Privacy Act establishes a complaints procedure for the investigation of complaints under the Act. It also provides individuals with the means to have access to their records and request correction of any wrong information; and it requires every agency to have Privacy Officers, whose role it is to administer the application of the Privacy Act in their organisation, deal with information privacy requests and work with the Privacy Commissioner on any investigations.

The breach of an Information Privacy Principle will normally amount to an interference with the privacy of an individual, depending on the consequences of the breach.²⁵ If such a breach proceeds to the Human Rights Review Tribunal, the Tribunal has the power to grant various remedies, including damages up to \$200,000.00. Section 127 of the Act

²² See preamble to the Privacy Act 1993.

²³ See Mackay R and McCartney R, *Privacy Law and Practice* (Butterworths, Wellington, 1995), A/6.

²⁴ See sections 2 to 5 of the Privacy Act 1993.

²⁵ See section 66 of the Privacy Act 1993.

sets out the only criminal offences under the Act, which pertain to interference with the Privacy Commissioner's investigations or instructions.

4.1.5 *The New Zealand Bill of Rights Act 1990*

The New Zealand Bill of Rights Act 1990 is, as already noted and reflected within the long title to the Act, the primary instrument through which New Zealand has implemented its obligations under the ICCPR. This part of the chapter only seeks to provide an overview of the Bill of Rights. A more detailed consideration of the operative provisions of the Act, and its 'limitations clause' in particular, is given later in the chapter.²⁶ For now, it is sufficient to briefly consider the development of the Bill of Rights, the affirmation of rights within the Act, the application of the Act to the State, and the special role of the Attorney-General under the Act.

4.1.5(a) *A Bill of Rights for New Zealand*. In his introduction to the White Paper on a Bill of Rights for New Zealand, Sir Geoffrey Palmer set out the motives of the Bill as follows:²⁷

A Bill of Rights for New Zealand is based on the idea that New Zealand's system of government is in need of improvement. We have no second House of Parliament. And we have a small Parliament. We are lacking in most of the safeguards which many other countries take for granted. A Bill of Rights will provide greater protection for the fundamental rights and freedoms vital to the survival of New Zealand's democratic and multicultural society.

The adoption of a Bill of Rights in New Zealand will place new limits on the powers of Government. It will guarantee the protection of fundamental values and freedoms. It will restrain the abuse of power by the Executive branch of Government and Parliament itself. It will

²⁶ See below at 4.3.2 *The New Zealand Bill of Rights Act* and 4.4.2 *Limiting Rights under the Bill of Rights Act and Human Rights Act*.

²⁷ New Zealand Department of Justice, *A Bill of Rights for New Zealand - A White Paper* (Government Printer, Wellington, 1985), 5.

provide a source of education and inspiration about the importance of fundamental freedoms in a democratic society. It will provide a remedy to those individuals who have suffered under a law or conduct which breaches the standards laid down in the Bill of Rights. It will provide a set of minimum standards to which public decision making must conform.

In its original form, Sir Geoffrey Palmer intended the NZBORA to have an enormous impact on the field of civil liberties in New Zealand. It was to be supreme law, overriding all other Acts of Parliament, all subordinate legislation and all public practices, in the same way as the Canadian Charter of Rights and Freedoms 1982 (the Canadian Charter).²⁸ In its final form however, there were many significant changes made to the Bill and differences therefore exist between it and its Canadian equivalent. The most important of these relates to the status of the New Zealand instrument. Under the Canadian Charter, all forms of legislation are subject to the rights and freedoms guaranteed under the Charter. Any provisions of an Act of Parliament inconsistent with those rights and freedoms can be struck down by the judiciary. The rights and freedoms affirmed in the NZBORA, however, are subject to ordinary legislation: the Charter is “supreme” law, while the NZBORA is part of “ordinary” law.

This is a matter that has drawn the repeated criticism by the UN Human Rights Committee in its comments upon New Zealand’s reports to the

²⁸ The Canadian Charter is not an instrument on its own, but is in fact Part I of Canada’s Constitution Act 1982, which is in turn Schedule B to the Canada Act 1982 (UK).

Committee under article 40 of the ICCPR. In its comments on New Zealand's Third Periodic Report in 1994, the Committee said this:²⁹

The Committee regrets that the provisions of the Covenant have not been fully incorporated into domestic law and given an overriding status in the legal system. Article 2, paragraph 2, of the Covenant requires States parties to take such legislative or other measures which may be necessary to give effect to the rights recognized in the Covenant. In this regard the Committee regrets that certain rights guaranteed under the Covenant are not reflected in the Bill of Rights, and that it does not repeal earlier inconsistent legislation, and has no higher status than ordinary legislation. The Committee notes that it is expressly possible, under the terms of the Bill of Rights, to enact legislation contrary to its provisions and regrets that this appears to have been done in a few cases.

In reply to those criticisms by the Committee, the Fourth Report of 2000 seems to have either failed to answer the criticism, or misunderstood it.³⁰

The Government's response was to redirect the HRC criticism to the limited issue of the ability of Parliament to be able to pass legislation despite a report from the Attorney-General under section 7 of the

²⁹ Ministry of Foreign Affairs and Trade, *New Zealand's Third Periodic Report to the Human Rights Committee* (1994) CCPR/C/64/Add.10; and *Human Rights Committee Comments on New Zealand's 3rd Periodic Report*, (1995) CCPR/C/79/Add.47, para 11.

³⁰ Fourth Periodic Report, above n 6, paras 24 to 34 inclusive. One should not, however, take this article as treating the Human Rights Committee's criticism as being entirely meritorious. It is, in fact, rather simplistic in its approach and assumes that the judiciary should be the ultimate body deciding upon the extent to which citizens should enjoy rights and freedoms. In a recent report of the Regulations Review Committee, for example, Parliament was described as having this role, the Committee referring to Parliament as the "guardian of the public interest": see Report of the Regulations Review Committee, *Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments*, NZAJHR (2002) I. 16H, 16. That is, however, a subject outside the scope of this chapter. What is being illustrated is that New Zealand's Fourth Periodic Report effectively ignored the criticism.

NZBORA, allowing the possibility of some legislation enacted in breach of the Act and possibly the Covenant. The Fourth Report explained:³¹

Section 7 constitutes a safeguard designed to alert Members of Parliament to legislation which may give rise to an inconsistency with the Bill of Rights Act and, accordingly, to enable them to debate the proposals on that basis (see *Mangawaro Enterprises Ltd. v. Attorney-General* [1994] 2 NZLR 451, 457). The role of scrutinizing bills for consistency with the Bill of Rights Act and providing advice to the Attorney-General on the exercise of his or her duties under Section 7 is performed by the Ministry of Justice (in the case of legislation being promoted by a Minister other than the Minister of Justice), and by the Crown Law Office (in the case of legislation being promoted by the Minister of Justice).

The New Zealand Government pointed out that this vetting process can involve complex issues and that, in a number of circumstances, it is quite possible for there to be reasonably held competing points of view as to whether a provision does or does not infringe the provisions of the Act. While that is entirely rational, this response failed to answer the Committee's earlier comments to the Third Periodic Report. The comments of the Human Rights Committee did not amount to a criticism of the legislative safeguards against enacting inconsistent legislation; they were in essence stating that this should not be a question for Parliament but one for the judiciary, with the power for the judiciary to strike down inconsistent provisions.

4.1.5(b) The affirmation of rights. Part II of the Bill of Rights Act sets out the substantive rights affirmed by the Act, largely reflecting the content of the ICCPR on the subjects of life and security of the person, democratic and civil rights, non-discrimination and minority rights, search, arrest and

³¹ Fourth Periodic Report, *ibid*, para 27.

detention, and rights to justice. A point to note is that the Act expresses itself as ‘affirming’ those rights (section 2), making it specifically clear under section 28 that:

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

4.1.5(c) Application to the State. In broad terms, the application of the Bill of Rights is limited to the conduct of the State and its agents:

3. Application

This Bill of Rights applies only to acts done—

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The text of Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights*, talks at great length about the impact of section 3 upon the legislative, executive and judicial roles of each branch of the State.³² For the purpose of this thesis, it is sufficient to note that the Bill of Rights applies to legislation,³³ and the conduct of the executive branch, and the judiciary.³⁴

³² Rishworth P, Huscroft G, Optican S and Mahoney R, *The New Zealand Bill of Rights* (Oxford University Press, 2003), Chapter 3, 70-115.

³³ *Ibid*, 72.

³⁴ *Ibid*, 81-83.

4.1.5(d) *The role of the Attorney-General.* Already noted within Chapter Three is the fact that the NZBORA requires the Attorney-General to report to the House during the process of law-making:³⁵

7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

- (a) In the case of a Government Bill, on the introduction of that Bill; or
- (b) In any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights.

The role of Attorney-General under section 7 was not something that had been provided for under the White Paper version of the Bill of Rights, but was introduced as a compromise in the removal of the entrenched status of the Act and the introduction of the section 4 ‘sovereignty’ clause.³⁶ The purpose of the provision is to promote compliance with the Bill of Rights’ substantive rights and freedoms protection, prompting Parliament to turn its mind to the passing of any legislation that would abrogate one of those substantive rights.³⁷ Two particular matters are relevant. Firstly, the obligation to report to the House only arises when any Bill is “introduced”. There is no duty to review and report on any amendments to a Bill made or recommended as a result of the select committee review process.³⁸ The second matter of importance is the relevance of section 5 to the Attorney-General’s function. Section 5 sets out a ‘justified limitations’ provision

³⁵ Chapter Three, 3.11.1(e) *Attorney-General’s advice.*

³⁶ *A Bill of Rights for New Zealand - A White Paper*, above n 27.

³⁷ Rishworth et al, above n 32, 195-196.

³⁸ *Ibid*, 196-197.

and, according to Crown Law officer Andrew Butler, “almost all advices prepared by the Ministry of Justice and the Crown Law Office for the Attorney-General as part of the section 7 NZBORA vetting process rely to some extent on section 5”.³⁹

On the question of law-making, it should also be noted that the Legislative Advisory Committee⁴⁰ has adopted *Guidelines on Process and Content of Legislation*.⁴¹ Part of the Committee’s mandate is to “help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines”.⁴² The *Guidelines* require law-makers to confirm that proposed legislation complies with the NZBORA, Human Rights Act, Privacy Act, and international obligations.⁴³

4.2 Why Consider Human Rights in the Examination of Counter-Terrorist Legislation?

Having outlined the basic features of New Zealand’s civil and political rights framework, but before proceeding to consider the application of the ICCPR and NZBORA, some brief consideration should be given to the question of ‘why’. Why consider the International Covenant and the New Zealand Bill of Rights in a thesis on counter-terrorism? The answer lies in several parts. The obvious reason is that the preceding chapter, in

³⁹ Butler A, “Limiting Rights”, (2002) 33 *Victoria University of Wellington Law Review* 537, 538. See also Rishworth et al, above n 32, 197.

⁴⁰ Established by the Minister of Justice in 1996; see Department of Justice, ‘Who and What is the Legislative Advisory Committee?’ at URL <<http://www.justice.govt.nz/lac/who/index.html>> at 24 March 2004.

⁴¹ Legislative Advisory Committee, *Guidelines on Process and Content of Legislation* (2001 ed, including 2003 supplement), available at URL <<http://www.justice.govt.nz/lac/>>.

⁴² Above n 40, Term of Reference (e).

⁴³ Above n 41, chapters 4, 6 and 15.

reviewing New Zealand's counter-terrorist legislation, identified several aspects of the legislation that could adversely impact upon civil and political rights in particular, upon rights to justice; the freedoms of expression, assembly and association; and criminal procedure rights, search, arrest and detention rights.⁴⁴ This, by itself, calls for further consideration of the impact of counter-terrorist measures upon human rights, although it is important to recognise that New Zealand is not the only jurisdiction in which such issues have arisen.⁴⁵ Linked with the international concern about the impact of counter-terrorism upon human

⁴⁴ Chapter Three, 3.14 Potential Civil and Political Rights Issues.

⁴⁵ At the United Nations Conference on Human Rights in 2002, for example, the High Commissioner for Human Rights reported that "excessive measures have been taken in several parts of the world that suppress or restrict individual rights including privacy rights, freedom of thought, presumption of innocence, fair trial, the right to seek asylum, political participation, freedom of expression and peaceful assembly": see *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/81, 27 February 2002, E/CN.4/2001/8, para 9. Various international non-governmental organisations have similarly pointed to human rights violations occurring in pursuit of the war on terror including, by way of example, the International Federation for Human Rights, the World Organization Against Torture and Amnesty International - see United Nations Foundation, 'HUMAN RIGHTS: Observatory Says Anti-Terror Efforts Cover for Repression', *UN Wire*, 27 March 2003, URL <http://www.unfoundation.org/unwire/util/display_stories.asp?objid=32834> at 29 March 2003, and 'TERRORISM: Rights Group Blasts Governments' Responses, Cites Abuses', 29 March 2003, URL <http://www.unfoundation.org/unwire/util/display_stories.asp?objid=32834> at 29 March 2003. See also United Nations Foundation, 'Counter-Terrorism To Blame For Erosion Of Rights, Expert Says', *UN Wire*, 11 November 2003, URL <http://www.unfoundation.org/unwire/util/display_stories.asp?objid=136617> at 17 November 2003. The Security Council Counter-Terrorism Committee has itself acknowledged that there have been expressions of concern about human rights arising from anti-terrorism efforts: see United Nations Foundation, 'RIGHTS COMMITTEE: UN Panel Hears From Terror Expert, Ends Session', *UN Wire*, 7 April 2003, URL <http://www.unfoundation.org/unwire/util/display_stories.asp?objid=33033> at 14 April 2003. In March 2003, Human Rights Watch issued a briefing paper on purported human rights abuses, including studies on ten States in which it was said that violations of human rights were occurring through the implementation of counter-terrorist measures: Human Rights Watch Briefing Paper, *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, (Human Rights Watch, 2003), part III. The countries identified were China, Egypt, Georgia, India, Indonesia, Russia (Chechnya), Spain, the United Kingdom, the United States and Uzbekistan.

rights (both before and since September 11), various bodies have considered the issue of compliance with human rights when countering terrorism. As is discussed in more detail within Chapter Five, a substantial body of both 'hard' and 'soft' law directs that counter-terrorism must indeed be pursued in a manner that is consistent with human rights.⁴⁶

There are then three additional, practical, features arising from New Zealand's human rights framework that require its consideration. The first is that if counter-terrorist legislation is found to be in contravention of the ICCPR this will draw adverse comments from the Human Rights Committee (under the Covenant's reporting procedure) or, in the case of individual communications to the Committee, directions from the Committee for New Zealand to take remedial steps. This is particularly so, having regard to the Committee's observations in response to New Zealand's latest periodic report under the ICCPR:⁴⁷

The State party is under an obligation to ensure that measures taken to implement Security Council resolution 1373 (2001) are in full conformity with the Covenant.

From a domestic perspective, the Bill of Rights Act will itself impact upon any counter-terrorist legislation that is inconsistent with the rights and freedoms contained in the Bill of Rights - bringing into play the second and third practical reasons requiring consideration of human rights. On one level, the Bill of Rights impacts upon statutory interpretation, calling (in very broad terms) for legislation to be interpreted consistently with it and

⁴⁶ That is, a mixture of documentation representing guiding principles and non-binding resolutions and recommendations ('soft law'), together with binding resolutions, treaty provisions and customary law ('hard law'). See Chapter Five, 5.2 Is Compliance with Human Rights Necessary?

⁴⁷ Human Rights Committee, *Concluding observations of the Human Rights Committee: New Zealand*, 17 July 2002, CCPR/CO/75/NZL, para 11.

the ICCPR.⁴⁸ The third feature to bear in mind is that, despite the absence of a remedies provision within the NZBORA, it must also be remembered that a finding of a breach of the Bill of Rights will likely result in some form of remedy being awarded by the courts.⁴⁹ It should be noted in that regard, that the New Zealand Court of Appeal and the House of Lords have recently shown themselves to be willing to act as a check and balance upon the executive and legislature, even in matters concerning the national interest.⁵⁰ It is therefore essential, it is posited, to examine the potential

⁴⁸ Consider, for example, *Minister of Home Affairs v Fisher* [1980] AC 319, 328, where Lord Wilberforce spoke of broad and simple language within human rights legislation needing to be given a generous interpretation designed to give individuals the full measure of the fundamental rights and freedoms referred to. Furthermore, despite the well known proposition of statutory interpretation requiring application of clear and unambiguous terms of a statute to be applied (see Evans J, *Statutory Interpretation. Problems of Communication*, Oxford University Press, 1989, 2), it is clear that - where possible - the courts will attempt to reconcile the meaning of a statute so as to give effect to treaty obligations. This stems from the basic constitutional presumption that Parliament does not intend to legislate in a manner contrary to its international legal obligations. See, for example, Lord Scarman's comments in *Attorney-General v British Broadcasting Corp* [1981] AC 303, 354; and *R v Chief Immigration Officer, Heathrow Airport, ex parte Salemat Bidi* [1967] 1 WLR 979, 984 (per Denning LJ). This is, however, subordinate to the strict doctrine of statutory interpretation already mentioned. Nevertheless, the idea of searching for consistency is not new. In the 1974 case of *Police v Hicks* [1974] 1 NZLR 763, the Court readily accepted the relevance of the Single Convention on Narcotics (ratified by New Zealand in 1963) in interpreting the Narcotics Act 1965. For a further discussion of the differing approaches to interpretation concerning language, intent, uniformity, and conflicting doctrines, see Evans J, "Questioning the Dogmas of Realism" (2001) *New Zealand Law Review* 145.

⁴⁹ Whether that be by way of a stay of prosecution in the case of unduly delayed criminal proceedings (see, for example, *Martin v Tauranga District Court* [1995] 2 NZLR 419, where the Court of Appeal held that a 17 month delay from charge to trial date was, on the facts, a breach of section 25(b) of the NZBORA and that stay of proceedings was the appropriate remedy); or civil damages where no other effective remedy is available (as occurred in *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 and *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720); or even the controversial indication of inconsistency (as considered in *Moonen v Film and Literature Review Board* [2000] 2 NZLR 9, *R v Poumako* [2000] 2 NZLR 695, and *R v Pora* [2001] 2 NZLR 37).

⁵⁰ See *Attorney-General v Zaoui (No 2)* [2005] 1 NZLR 690, and *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)*, 16 December 2004, [2004] UKHL 56.

civil and political rights issues identified in Chapter Three. The first step in doing that, through this chapter, is to consider how the ICCPR and NZBORA are to be applied and what allowance each instrument makes for the limitation of rights.

4.3 Application of the ICCPR and NZBORA

As discussed, the International Covenant on Civil and Political Rights and the New Zealand Bill of Rights Act stand as the primary instruments in New Zealand's civil and political rights framework.⁵¹ It is therefore important to understand, at least in general terms, how these two instruments are to be applied.

4.3.1 The International Covenant on Civil and Political Rights

In providing an overview of the application of the ICCPR, three matters warrant discussion: the role of the document's treaty-monitoring body, the United Nations Human Rights Committee; the different status within the Covenant accorded to 'non-derogable' rights; and the ability to derogate from the Covenant in times of emergency. This part of the chapter considers the first matter only. Examination of derogable and non-derogable rights and the suspension of rights in times of public emergency will be had later in this chapter when discussing the limitation of rights.⁵²

In providing an overview of New Zealand's obligations under the international human rights regime, mention was made of the special role and functions of the UN Human Rights Committee, established under the

⁵¹ Discussed above at 4.1 New Zealand's Civil and Political Rights Framework.

⁵² Discussed below at 4.4.1 *Limiting Rights under the International Covenant*.

International Covenant on Civil and Political Rights. Two functions of the Committee warranting some comment are those under the periodic reporting requirements of the Covenant and the individual communications procedures under its First Optional Protocol.⁵³

Article 40 of the ICCPR requires States parties to submit periodic reports to the Committee on the measures they have adopted to give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of those rights. New Zealand has submitted four periodic reports since it became a party to the ICCPR in 1978.⁵⁴ When reports are lodged with the Committee, they are considered by it and any observations or comments are transmitted to the State party by way of a report.⁵⁵ The observations of the Committee to New Zealand's reports have generally been positive, although it has adversely commented upon the fact that the New Zealand Bill of Rights Act is unable to repeal earlier inconsistent legislation and has no higher status than ordinary legislation. Where particularly adverse observations are being made, the Committee is able to transmit these comments to the United Nations Economic and Social Council in what has been described as a 'naming and shaming' exercise.⁵⁶

⁵³ The third function identified was that of making general comments on the interpretation and application of the International Covenant on Civil and Political Rights. While that is certainly an important role which will assist in the later analysis of particular rights, this part of the chapter seeks to consider the role of the Human Rights Committee *vis à vis* New Zealand.

⁵⁴ For a more detailed discussion of the contents of New Zealand's latest (fourth) periodic report, and the comments of the Human Rights Committee to that reports, see Conte A, "International Reflections on Civil and Political Rights in New Zealand" (2002) 8 *The Canterbury Law Review* 480.

⁵⁵ International Covenant on Civil and Political Rights, article 40(4).

⁵⁶ International Covenant on Civil and Political Rights, article 40(4). Use of the term 'name and shame' was made by the current Chair of the Commission of Human Rights, Ambassador Mike Smith, *The UN Commission on Human Rights*:

The second means of Committee scrutiny of State party compliance with the International Covenant is through the individual communications (complaints) procedure established under the First Optional Protocol to the ICCPR, to which New Zealand is a party. Article 1 of the Protocol recognises the competence of HRC “to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant”. Individuals in New Zealand (including those in New Zealand’s territory that are not citizens) who claim that any of their substantive rights enumerated in the ICCPR have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration. Upon receipt of such a communication (after a finding that the communication is admissible)⁵⁷ the Committee will consider in detail the allegation made by the author of the communication to determine whether there has been a breach of the ICCPR and, if so, what remedial steps should be directed.⁵⁸ A number of individual

Reflections on a Year as Chair, 31 August 2004, Centre for International and Public Law seminar, Australian National University.

⁵⁷ On the issue of admissibility, the First Optional Protocol sets out various criteria. For discussion of this, see Conte, Davidson and Burchill, above n 21, chapter 2.

⁵⁸ By article 2 of the International Covenant on Civil and Political Rights, the Committee will direct the State to put into place “effective remedies”, the nature of which will depend on the particular complaint. On the issue of the status of ‘decisions’ of the Human Rights Committee (technically called “views”), see: Davidson JS, “Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee”, in Huscroft G and Rishworth P (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing Ltd, 2002), 305; McGoldrick D, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1990), chapters 2, 3 and 4; Pocar F, “Legal Value of the Human Rights Committee’s Views” 1991-1992 *Canadian Yearbook of Human Rights*, 119; and Tomuschat C, “Evolving Procedural Rules: The United Nations Human Rights Committee’s First Two Years of Dealing with Individual Communications” (1980) 1 *Human Rights Law Journal* 249.

communications have been lodged against New Zealand, with an adverse finding having recently been made by the Committee in *Rameka et al v New Zealand*.⁵⁹

4.3.2 *The New Zealand Bill of Rights Act*

The New Zealand Bill of Rights stands as New Zealand's primary piece of Domestic legislation through which civil and political rights are protected. Having already provided a general overview of matters impacting upon the application of the Act,⁶⁰ this part of the chapter will consider two issues in detail: the operative provisions of sections 4, 5 and 6; and the meaning of the term "enactments" (as used in sections 4 and 6 of the Act).

4.3.2(a) *The 'unholy trinity' of sections 4, 5 and 6.* The precise application of the NZBORA to any perceived conflict between it and any other rule is governed by what Dr James Allan has described as the "unholy trinity" of sections 4, 5 and 6 of the Act:⁶¹

4. Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

- (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) Decline to apply any provision of the enactment—
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

⁵⁹ *Rameka et al v New Zealand*, Human Rights Committee Communication 1090/2002. Concerning this communication, see Conte A, "Human Rights, Non-Parole Periods and Preventive Detention" (2004) *New Zealand Law Journal* 202. Concerning communications against New Zealand in general, see Conte A, "International Reflections on Civil and Political Rights in New Zealand" (2003) 8 *The Canterbury Law Review* 480, 497-498.

⁶⁰ Discussed above at 4.1.5 *The New Zealand Bill of Rights Act 1990*.

⁶¹ Allan J, "The Operative Provisions - An Unholy Trinity" [1995] *Bill of Rights Bulletin* 79.

5. Justified limitations

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

In general terms, the provisions are easy enough to understand. Section 4, a last-minute insertion into the Bill as a means of protecting Parliamentary sovereignty, ‘protects’ enactments by preventing the courts from ruling them to be invalid or ineffective as a result only of their inconsistency with the NZBORA. Section 6 requires that, where a provision of an enactment is open to more than one interpretation, then the interpretation that is consistent with the NZBORA is to be adopted. Section 5, an almost identical reflection of article 1 of the Canadian Charter of Rights and Freedoms 1982, permits limitations to be placed upon the rights and freedoms within the NZBORA where this reasonable, prescribed by law, and demonstrably justified in a free and democratic society.

The difficulty lies with the inter-relationship of the sections and the order in which they are to be applied. Section 4 talks of protecting provisions that are “inconsistent” with the Bill of Rights, while section 6 speaks of adopting meanings that are “consistent” with it. Section 5 sets out a limitations test, but expresses itself to be “subject to section 4”. The early approaches to the application of these provisions were set by the New Zealand Court of Appeal in *Noort v MOT; Curran v Police*.⁶² On the one hand, Cooke P took the view that primary focus should be placed upon

⁶² *Noort v MOT; Curran v Police* [1992] 3 NZLR 260.

sections 4 and 6 by determining whether there is an “irreconcilable conflict” between the legislation and the NZBORA. That is, the Court should first apply section 6 to try to achieve a consistent interpretation and then, if there is no consistent application, apply section 4 to override the NZBORA. In contrast, the approach of Justices Richardson, Hardie Boys and McKay placed emphasis on section 5 by first asking whether or not the provision or practice in question can be justified under section 5 of the Act. Delivering a more recent judgment of the same Court in *Moonen v Film and Literature Board of Review*, Tipping J outlined a five-step approach that he described as ‘helpful’ to the practical application of the operative provisions.⁶³ It is notable, however, that this methodology was later expressed by the Court of Appeal as not intended to be prescriptive and that other approaches were open to application of the operative provisions of the Bill of Rights Act.⁶⁴

⁶³ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17. The five-step process was described as follows:

1. Identify the different interpretations of the words contained in the enactment being examined: if only one interpretation is open: that meaning should be adopted (s4); if more than one meaning is open, proceed to the next step.
2. Identify the meaning which constitutes the least possible limitation on the right or freedom in question and adopt that meaning (s6).
3. Having adopted the appropriate meaning (through either steps one or two), identify the extent – if any – to which that meaning limits the relevant right or freedom.
4. Consider whether that limitation (if found) can be demonstrably justified in a free and democratic society (s5): if it can, then that is the end of the matter; if it cannot, proceed to the next step.
5. Although a particular meaning to the enactment will have been adopted by this stage (ss4 or 6), if that meaning “fails” the s5 test, then it is a limitation that is not justifiable in a free and democratic society. Step 5 accordingly requires the Court to issue a declaration to that effect (termed a declaration of inconsistency or incompatibility).

⁶⁴ *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754, 760 (para 15). See also *Hopkinson v Police* [2004] 3 NZLR 704, 709 (para 28), in which France J in the High Court observed that the five-step process outlined in *Moonen (No 1)* was not a prescriptive one and other approaches were available in Bill of Rights cases.

Taking into account that the final step advocated in *Moonen* is merely announcing the result of the fourth step, Professor Rishworth's text arrives at a four-step process in the application of sections 4, 5 and 6. The text also explains that the second and third steps in *Moonen* are reversed, rationalising that although there is little practical difference in doing so overall, the change makes the exercise more efficient by considering consistency before ambiguity.⁶⁵ For the purpose of this thesis, it is that text's approach that is adopted, and summarised as follows:⁶⁶

- Step 1: Does the enactment establish a limit on a right?

It is for the party seeking to invoke the Bill of Rights to firstly define the right being invoked and demonstrate that it applies to the circumstances being complained of. If the party is unable to do so, then the NZBORA is neither applicable nor relevant.⁶⁷

- Step 2: Is the advocated meaning 'inconsistent' with the right?

An enactment is 'consistent' with the Bill of Rights, explains the text, if "it either (a) effects no limitation on a right or freedom at all, or (b) limits a right or freedom to the extent permitted by s. 5".⁶⁸ This second step therefore calls for careful consideration of whether the enactment does limit a right or freedom and, if it does, whether (by application of

⁶⁵ Rishworth et al, above n 32, 136.

⁶⁶ Ibid, 135-157.

⁶⁷ See, for example, *Palmer v Superintendent Auckland Maximum Security Prison* [1991] 3 NZLR 315 (where it was held that section 4 of the Criminal Justice Act 1985 had no application to the right of a prisoner to be credited with time spent on remand in determining eligibility for parole), and *Hart v Parole Board* [1999] 3 NZLR 97 (where it was held that recall from parole was part of the punishment for the original offending and did not therefore amount to a double punishment).

⁶⁸ Rishworth et al, above n 32, 138.

section 5) such a limit is justified.⁶⁹ There are three potential outcomes. Firstly, the enactment does not effect a limitation upon the advocated right, in which case the right is fully protected and there is no need for further enquiries to be made.⁷⁰ Secondly, if the enactment does effect a limitation, it might be concluded that the limitation is demonstrably justified in a free and democratic society. In that event, the enactment is not ‘inconsistent’ with the Bill of Rights and this again brings consideration of the NZBORA to a close. It is only in the third potential outcome that the matter must proceed to steps 3 and 4: where the enactment does effect a limitation upon a right or freedom and the limitation cannot be justified under section 5 of the NZBORA.

- Step 3: Is an alternative meaning possible?

The third step is to establish whether an alternative interpretation of the enactment (one that *is* consistent with the right invoked) is possible. The important feature here is that any alternative meaning must not be as a result of a strained interpretation of the enactment, contrary to its ordinary meaning or to Parliament’s intent.⁷¹ Andrew Butler adds that, since consideration of section 5 needs to precede the determination of a

⁶⁹ Which is, as pointed out by Rishworth, analogous to the methodology adopted under the Canadian Charter of Rights and Freedoms: *ibid*, 138; see also *R v Oakes* [1986] 1 SCR 103, 138-139.

⁷⁰ That is effectively the same outcome as failing to demonstrate that the right invoked applies to the circumstances being complained of (step 1).

⁷¹ Above n 32, 143-147. See, in particular, *R v Clarke* [1985] 2 NZLR 212, 214, where the Court of Appeal criticised an earlier obiter approach in *Flickenger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, in which the Court has discounted the statutory context and history of section 66 of the Judicature Act 1908 in favour of a literal meaning of the provision. The meaning adopted must be ‘reasonably available’: see, for example, *R v Phillips* [1991] 3 NZLR 175, 176-177, *Noort v MOT*; *Curran v Police* [1992] 3 NZLR 260, 272, and *Simpson v Attorney-General (Baigent’s Case)* [1994] 3 NZLR 667, 674.

binding interpretation of an enactment, section 6 can only demand that the courts apply a meaning which least reasonably limits the NZBORA.⁷²

- Step 4: Adopt the consistent meaning, if properly available.

The previous investigations all lead to the application of the directions under sections 4 and 6 of the Bill of Rights Act. If there is an alternative meaning properly available in the interpretation of the enactment, then section 6 directs that this must be adopted. If there is no alternative meaning, then the enactment is (in the words of Cooke P) in an “irreconcilable conflict” with the Bill of Rights and must, by application of section 4, prevail.

4.3.2(b) *The meaning of the term “enactments”*. As might be evident from the preceding discussion, the meaning of the term “enactments” has significant consequences upon the application of the operative provisions. In basic terms, if the provision being complained of is not an “enactment”, then section 4 of the NZBORA cannot act to ‘preserve’ the provision where it is in conflict with one of the rights and freedoms within the Bill of Rights. Against that background, the issue to consider is what the meaning of “enactments” is - in particular, whether subordinate legislation falls within the scope of the term. Two potentials exist. The first, by way of a broad interpretation, is that the term is taken to include subordinate legislation as well as Acts of Parliament. Alternatively, by way of

⁷² Butler, above n 39, 577. Compare this to the approach under section 3(1) of the Human Rights Act 1998 (UK), where the UK Parliament rejected the New Zealand model of requiring a reasonable interpretation: see discussion on this point by the House of Lords in *Ghaidan v Mendoza* [2004] 3 All ER 411, 426.

restrictive interpretation, the term could be taken to refer to Acts of Parliament alone.⁷³

There are a number of arguments that could be made in support of both approaches. With respect to the broad approach, three main points can be made that tend to favour that approach. The first pertains to the Interpretation Act 1999, in which the term “enactment” is defined as inclusive of both primary and subordinate legislation.⁷⁴ Following this approach, an enactment is the whole or part of any Act of Parliament and includes subordinate legislation made under its principal. In his most recent edition of *Statute Law in New Zealand*, Professor John Burrows concludes that this definition is to be applied to the terms as used in section 4 of the Bill of Rights, unless the regulations were *ultra vires*.⁷⁵

In his second edition of *Statute Law in New Zealand*, Professor Burrows discussed the matter in more detail and posited that the term “enactments” must extend to regulations as well as Acts of Parliament if one considers the language of section 4 of the Bill of Rights Act.⁷⁶ In doing so he points to the fact that section 4 of the Bill of Rights Act refers to enactments “passed” or “made”. Since Acts of Parliament are *passed* by Parliament, and subordinate legislation *made* by delegates, the logical conclusion to be drawn is that Parliament must have intended “enactments”

⁷³ The various arguments presented below are discussed in more detail in the author’s article “The Application of Section 4 of the Bill of Rights Act 1990 to Subordinate Legislation” [1997] 3 *Human Rights Law and Practice* 146.

⁷⁴ The earlier Acts Interpretation Act 1924 only defined the term “Act” (as “an Act of the General Assembly and includes all rules and regulations made thereunder”); whereas its successor, the Interpretation Act 1999, defines “enactment” as “the whole or a portion of an Act or regulations”.

⁷⁵ Burrows JF, *Statute Law in New Zealand*, (3rd ed, LexisNexis, 2003), 259. The question of regulations being *ultra vires* through application of the New Zealand Bill of Rights Act 1990 is discussed later in this section of the chapter.

⁷⁶ Burrows JF, *Statute Law in New Zealand*, (2nd ed, Butterworths, 1999), 337.

to include both Acts of Parliament and subordinate legislation. There is weight in this argument, particularly when one has further regard to the wording of section 4 (sub-paragraph (a) in particular), which refers to provisions impliedly “repealed” or “revoked”. As before, an Act of Parliament is *repealed*, whereas subordinate legislation is *revoked*.

A third argument in favour of a broad interpretation of the term “enactments” could be based on the case of *Black v Fulcher*.⁷⁷ The New Zealand Court of Appeal held in that case that, generally, the word “enactment” is a convenient and succinct term embracing any Act or rules or regulations made thereunder and any provision thereof. In the absence of some “good reason”, the then President Cooke would not accept that the term should be given a restrictive interpretation to refer only to an Act or any provision of an Act. This position must be tempered, however, by the fact that this decision was made prior to the Interpretation Act 1999. At that time, the Acts Interpretation Act 1924 was in force, which only defined the term “Act”, whereas the current Interpretation Act defines the term “enactment”.⁷⁸

In favour of a restrictive interpretation (excluding regulations from the meaning of enactments under section 4), it is posited that one needs to start with consideration of the general rule of statutory interpretation that an Act of Parliament has primacy over subordinate legislation so that, if there is a conflict between an Act and a regulation, the regulation must give way.⁷⁹

⁷⁷ *Black v Fulcher* [1988] 1 NZLR 417.

⁷⁸ Above n 74.

⁷⁹ See dictum of Lord Herschell in *Institute of Patent Agents v Lockwood* [1894] AC 347, 360 - followed by Stout CJ and Adams J in *Lee v Macpherson (No 1)* [1923] NZLR 1296, 1304.

If that is correct, it should follow that where there is a conflict between the NZBORA and an item of subordinate legislation, then section 4 cannot save the subordinate legislation and the Bill of Rights will prevail.

The next point to note is Justice Henry's consideration of the term "enactments", as used in the Third Schedule of the Transport Amendment Act (No 2) 1963, in the case of *Munro v Auckland City*.⁸⁰ In that case, Justice Henry concluded that:⁸¹

...the word 'enactments' does not include the Act and the regulations which are described in the first column of Part IV. The word 'enactments' is of narrower import and should not be extended to mean the whole Act and regulations unless the context so requires.

Considering the constitutional importance of the Bill of Rights Act, and the purposive approach adopted by the judiciary in the application of the Act, it is suggested that this context does not require the word to be given a broad interpretation so as to allow delegates to legislate inconsistently with the rights and freedoms guaranteed under the Bill of Rights Act.

Regard might also be had to Hansard. At its second reading, the Bill of Rights Bill was presented before the House with a new "Clause 3A" inserted (now section 4 of the Act). During the debates of the second reading, Attorney-General Paul East discussed the motives of this new provision.⁸² The purpose of the clause was said to protect Parliament's role of making law.⁸³ While the original Bill was introduced as supreme

⁸⁰ *Munro v Auckland City* [1967] NZLR 873. Again, this decision was made prior to the enactment of the Interpretation Act 1999.

⁸¹ *Ibid*, 874.

⁸² New Zealand, *New Zealand Parliamentary Debates*, No 19, 3460, 14 August 1990.

⁸³ This was clearly a concern of various members of Parliament, as evident in their debates on the Bill of Rights Bill. See New Zealand, *New Zealand Parliamentary Debates*, No 62, 13038, 10 October 1989 (introduction); New Zealand, *New*

legislation, clause 3A was added to do away with this so that Parliament was not prevented from effecting changes to human rights aspects of the law if it felt it should do so in the future. However, the Parliamentary debates did not focus on a delegate's power to make subordinate legislation. Similarly, the specific wording of the clause ("pass" versus "made" and "repeal" versus "revoke") was a product of Select Committee recommendations and the distinctions alluded to by Professor Burrows were not contemplated by Parliament in its debates.

Furthermore, section 7 of the Bill of Rights itself points to the adoption of a restrictive interpretation of the term "enactments" so that it refers to Acts of Parliament alone. The NZBORA is an ordinary statute, giving Parliament the freedom to legislate inconsistently with its provisions. However, section 7 of the Act makes this power conditional in that it requires the Attorney-General to bring to the attention of the House of Representatives any provision in a Bill which appears to be inconsistent with the rights and freedoms guaranteed in the Bill of Rights Act. By doing so, Parliamentary supremacy⁸⁴ is still preserved since the final decision as to whether to contravene any right or freedom is left with Parliament, New Zealand's elected officials. It is in this context of limiting fundamental rights that the importance of section 7 can be seen. On a political level, section 7 brings any potential contravention of the Bill of Rights Act by any Bill before the House out into the open and forces

Zealand Parliamentary Debates, No 19, 3460, 14 August 1990 (second reading); and New Zealand, *New Zealand Parliamentary Debates*, No 20, 3759, 21 August 1990 (third reading).

⁸⁴ The protection of which is the aim of section 4: see Paccioco DM, "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] *New Zealand Law Review* 353, 355.

Parliament to make a conscious decision on whether to limit any right or freedom. Therefore, Parliament's legislative powers are well monitored to protect our fundamental freedoms.

The Regulations (Disallowance) Act now require all regulations to be laid before the House of Representatives, including regulations made under the United Nations Act 1946.⁸⁵ The House may then, by resolution, disallow any regulations or provisions of regulations or amend or substitute any regulations.⁸⁶ The Disallowance Act does not provide for any reporting procedure relating to apparent contraventions of the Bill of Rights Act, as section 7 of the NZBORA does in respect of Parliamentary Bills. Nevertheless, since January 1995, all draft regulations submitted to Cabinet for approval must be accompanied by a specified cover sheet.⁸⁷ The cover sheet is based on that used for draft Bills and is designed to ensure that Cabinet has due regard to a number of factors prior to approval of such regulations. Item 4(a) of the cover sheet requires the submitting Minister to indicate whether the regulations comply with the Bill of Rights Act.⁸⁸ It therefore appears that the abrogation of human rights by a delegate of legislative power is guarded against to some extent, although the extent to which the Regulations Review Committee is able to consider potential conflicts (having regard to time and resources) is debateable.

⁸⁵ Regulations under the United Nations Act 1946 are made by the Governor-General in Council: see section 2(1) of that Act. "Regulations" within the jurisdiction of the Regulations (Disallowance) Act 1989 include regulations made by the Governor-General in Council: see section 2(a)(i) of that Act.

⁸⁶ See sections 5 and 9 of the Regulations (Disallowance) Act 1989.

⁸⁷ See Cabinet Office circular "Procedures for Regulations Made by Order in Council" of 13 December 1994 CO(94)17; and Cabinet Office circular "Revised Procedures for regulations made by Order in Council" of 6 April 1995 CO(95)5.

⁸⁸ See Cabinet Office circular "Revised Procedures for Regulations Made by Order in Council" of 6 April 1995 CO(95)5, Appendix 2.

Notwithstanding the author's position that the term "enactments" might be given a restrictive interpretation for the purpose of section 4 (to exclude subordinate legislation), the practical approach taken by the New Zealand Court of Appeal in *Drew v Attorney-General* does away with the need to determine the issue.⁸⁹ Facing a charge of using heroin without the authority of a medical officer, Drew (a prison inmate) was heard by the deputy superintendent of the prison, who found the charge against him proved. On appeal to the Visiting Justice, Drew was refused permission to be represented by a lawyer at the hearing (in accordance with regulation 144 of the Penal Institutions Regulations 1999) and the Visiting Justice also found the case proved. The question before the Court of Appeal was whether Drew had the right to legal representation in prison disciplinary hearings and whether regulation 144 (made under the empowering provision of section 45(1) of the Penal Institutions Act 1954) properly did away with the right to representation. Although the Court concluded that regulation 144 was an "enactment", it held that the regulation was not protected by section 4 of the Bill of Rights Act. Instead, the Court focussed on the issue of interpreting the empowering provision in a manner consist with the NZBORA so to exclude the possibility of making regulations made under the empowering provision in conflict with the Bill of Rights.⁹⁰

It is therefore not really necessary to respond to Mr Butler's argument that the regulations in question are protected by s4 of the Bill of Rights... Counsel was correct, of course, when he said that a regulation is an "enactment." Section 29 of the Interpretation Act 1999 confirms that position. But the answer to counsel's argument is that, in striking

⁸⁹ *Drew v Attorney-General* [2002] 1 NZLR 58.

⁹⁰ *Ibid*, 73 (para 68).

down the regulations because they are *ultra vires* the empowering section (s45), the Court is not doing so only because they are inconsistent with the Bill of Rights. To the extent that it is necessary to refer to the Bill of Rights, the regulation is invalid because the empowering provision, read, just like any other section, in accordance with s6 of the Bill of Rights, does not authorise the regulation. The Court merely gives s45 a meaning that is consistent with the rights and freedoms contained in the Bill of Rights. In accordance with s6, that meaning is to be preferred to any other meaning. As Mr Wilding said, s4 is not reached.

Thus, the conclusion is this: the arguments in favour of adopting a broad interpretation of the term “enactments”, to include subordinate legislation, appear to be dominant. There are, at least in theory and in the writer’s opinion, considerable problems with that position. Ultimately, however, those problems are mollified by the approach of applying section 6 of the NZBORA to the empowering provision of an Act. In doing so, regulations made under the authority of the empowering provision, so as not to be *ultra vires*, must be made consistently with the NZBORA.

The question of “enactments” and the potential for empowering provisions to allow the making of regulations inconsistent with the Bill of Rights is examined later in this thesis, in the context of regulations made under the United Nations Act 1946.⁹¹

4.4 Limitations under the ICCPR and Domestic Law

The final issue to be considered within this chapter is that of how and when human rights may be limited. Some human rights are seen as absolute: rights and freedoms from which no derogation is permitted. Through

⁹¹ Chapter Six, see especially 6.4.3 *Applying section 4 of the NZBORA to section 2(2) of the UN Act*.

article 4(2) of the International Covenant on Civil and Political Rights, they include the right to life and the prohibitions against torture and slavery.⁹²

At the same time, it must be acknowledged that most human rights are not absolute. In some circumstances, rights and freedoms must be qualified in order to achieve other democratic objectives. As stated by Sir Ivor Richardson of the New Zealand Court of Appeal in *R v B*:⁹³

Individual freedoms are necessarily limited by membership of society and by the rights of others and the interests of the community.

Typically, as recognised by Sir Ivor, this occurs in two scenarios. The first is where a right or freedom conflicts with or must be measured against another right or freedom.⁹⁴ For example, freedom of expression does not carry with it the right to incite violence or racial hatred, defame others, engage in commercial fraud, or distribute objectionable material.⁹⁵ A further example is commonly seen in questions concerning the medical treatment of children. In such cases and for various reasons including religious belief, the parents of a child may choose not to permit their child

⁹² As defined within articles 6, 7 and 8(1) of the International Covenant on Civil and Political Rights. Refer, in this regard, to Chapter Five where further consideration is given to the idea of absolute rights: 5.3.2 *The Fiction of Non-Derogable Rights*.

⁹³ *R v B* [1995] 2 NZLR 178, 182.

⁹⁴ As recognised in the preamble of the International Covenant on Civil and Political Rights.

⁹⁵ Example given in the *White Paper*, above n 27, 71. See, for example, *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570, concerning two videos discussing aspects of homosexuality which had been classified under section 3(1) of the Films Videos and Publications Classification Act 1993 as “objectionable”.

to receive medical treatment, which exposes a conflict between the rights of the child⁹⁶ and the right to religious belief.⁹⁷

The next category of permissible derogation of rights is within the context of a conflict between a right or freedom and some important objective of the State. This, in turn, can be viewed within the framework of two categories: derogation of rights because of a state of emergency, as permitted by article 4 of the International Covenant on Civil and Political Rights; and/or where there is some pressing and substantial objective of the State that needs to be met (by proportionate means) for the maintenance of society itself. The latter qualified guarantee is effected within New Zealand legislation through section 5 of the Bill of Rights Act, to be discussed.

4.4.1 *Limiting Rights under the International Covenant*

The ICCPR recognises within its preamble and article 4 that not all rights are absolute. The preamble to the Covenant reads as follows:

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and

⁹⁶ More specifically, the right to life, as reflected in article 6 of the United Nations Convention on the Rights of the Child; and the requirement in article 3 of the Convention to give effect to the best interests of the child.

⁹⁷ See article 18(1) of the International Covenant on Civil and Political Rights; and section 13 of the New Zealand Bill of Rights Act 1990. See, for example, *Re J (An Infant): B&B v DGSW* [1996] 2 NZLR 134, concerning parents of J who were Jehovah's Witnesses and had objected to a blood transfusion recommended by hospital authorities.

political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant, [emphasis added]

Agree upon the following articles...

The Covenant does not, however, contain what might be termed a “general” limitations clause. Instead, the enunciation of rights and freedoms within the document contain, within the expression of the right or freedom, particular limitations that may be permitted as against that provision. Article 9(1) of the Covenant provides, for example:

No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. [emphasis added]

This feature of the Covenant calls for an article-by-article consideration of the ICCPR according to the particular right(s) being examined. This chapter does not seek to do so, instead leaving such analysis to the more specific and detailed examinations within Chapters Seven, Eight and Nine.⁹⁸

The only thing close to a general limitations provision is within article 4 of the International Covenant, which allows certain rights to be temporarily suspended in times of public emergency. Under article 4(1) of the ICCPR, a State party can further derogate from certain provisions of the

⁹⁸ For a consideration of the jurisprudence of the Human Rights Committee in examining the content and meaning of the rights contained within the ICCPR, see Conte, Davidson and Burchill, above n 21.

Covenant when a public emergency arises which threatens the life of that State:⁹⁹

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Although this chapter does not seek to consider whether terrorism falls within the scope of a public emergency, nor whether counter-terrorist measures can thus suspend rights in accordance with article 4, a number of provisos need to be noted concerning the operation of article 4(1).¹⁰⁰

4.4.1(a) Non-derogable rights. Article 4(2) of the Covenant sets out a list of rights that may not be derogated from when a public emergency is declared by a State party, being: the right to life (article 6); freedom from torture or cruel, inhuman or degrading treatment or punishment (article 7); the prohibition of slavery and servitude (article 8(1) and (2)); freedom from imprisonment for failure to fulfil a contract (article 11); freedom from retrospective penalties (article 15); the right to be recognised as a person before the law (article 16); and freedom of thought, conscience and religion (article 18). Notwithstanding that this is a clearly expressed provision within the ICCPR, and that international obligations flow from it, the

⁹⁹ Similar emergency measures are permitted under the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), article 15(1); and the American Convention on Human Rights, 1144 UNTS 123 (entered into force 18 July 1978), article 27(1).

¹⁰⁰ These issues are examined within Chapter Five at 5.3.1 *Terrorism and Emergency Measures*.

author has some difficulty with the notion that some rights are absolute and non-derogable. Certainly, some rights are particularly important. One's right to life is clearly of more significance than the right to be tried in criminal proceedings without undue delay. In the context of counter-terrorism, Chapter Five will return to this point and more closely examine the relationship (by way of example) between the right to life and counter-terrorism.¹⁰¹

4.4.1(b) Notice of derogation(s). A brief point to note is that paragraph 3 of article 4 requires any derogations implemented by a State party to be notified to the Secretary-General of the United Nations, identifying the rights and limitations being imposed, and the reasons for this. Equally, notice must be given when the derogation(s) are terminated. Notable at this point is the fact that New Zealand has never lodged a notice of derogation.

4.4.1(c) Public emergency. The Human Rights Committee has issued two general comments on the application of article 4 (the second replacing the first).¹⁰² It clearly considers that this is limited to states of emergency, as provided for within municipal legislation setting out grounds upon which a state of emergency may be declared.¹⁰³ While the Committee does not

¹⁰¹ Chapter Five, 5.3.2 *The Fiction of Non-Derogable Rights*.

¹⁰² Human Rights Committee, *Derogation of Rights (Art 4)*, CCPR General Comment 5 (1981), subsequently replaced by Human Rights Committee, *States of Emergency (article 4)*, CCPR General Comment 29 (2001).

¹⁰³ General Comment 29, *ibid*, para 2. The term “state of emergency”, rather than “public emergency” is that adopted by the Human Rights Committee within its general comments. It does not, however, reflect the actual wording of article 4(1), which refers to “public emergency” only. This is an important distinction, since (in the author's view) the latter phrase has a wider meaning than “state of emergency”. Ultimately, it should be noted that General Comments of the Human

explain its rationale in coming to this view, it seems to be based upon the wording of article 4(1) and upon the idea of certainty and the rule of law: the principle that there be certainty in the law, reasonably ascertainable by the people within a State so that they are able to regulate their conduct accordingly and know the basis upon which the State can act.

4.4.1(d) Exceptional and temporary nature. Finally, the Human Rights Committee has repeatedly stated that measures under article 4 must be of an exceptional and temporary nature, and may only continue for as long as the life of the nation concerned is threatened.¹⁰⁴ It added that such derogations must be both necessary and proportional, limited to the extent strictly required by the exigencies of the situation.¹⁰⁵

4.4.2 Limiting Rights under the Bill of Rights Act and Human Rights Act

As indicated, the provision by which New Zealand law accommodates limitations upon human rights and freedoms is section 5 of the New Zealand Bill of Rights Act 1990, which provides:¹⁰⁶

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Rights Committee are made by the Committee for the purpose of assisting interpretation and application of ICCPR provisions and are without legal standing. While they certainly might indicate the way in which the Committee might address a complaint presented to it, General Comments do not function as a binding interpretation or direction. In fact, the making of General Comments is not even set out within the ICCPR or its optional protocols as part of the Human Rights Committee's functions.

¹⁰⁴ Ibid, para 2.

¹⁰⁵ Ibid, para 4.

¹⁰⁶ Similarly, article 1 of the Canadian Charter of Rights and Freedoms, upon which New Zealand's section 5 NZBORA is based, provides that "[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

This limitation provision is equally application to discriminatory conduct on the part of the State, through section 20L of the Human Rights Act 1993.¹⁰⁷

20L. Acts or omissions in breach of the Part–

(1) An act or omission in relation to which this Part applies (including an enactment) is in breach of this Part if it is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.

(2) For the purposes of subsection (1), an act or omission is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 if the act or omission–

(a) limits the right to freedom from discrimination affirmed by that section; and

(b) is not, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right.

(3) To avoid doubt, subsections (1) and (2) apply in relation to an act or omission even if it is authorised or required by an enactment.

In discussing the application of section 5 of the NZBORA, a number of preliminary points need to be made.

4.4.2(a) *Balancing methodology.* An interesting technical issue in the application of section 5 is raised by Andrew Butler in his work on *Limiting Rights*.¹⁰⁸ He raises the question of whether consideration of limitations upon rights should, within the context of the NZBORA, be based upon a “definitional balancing” or an “ad hoc balancing”. That is, whether one should interpret the meaning of, and limitations upon, substantive rights provisions when defining the right or freedom being considered, and thereby largely do away with the need to consider section 5 (definitional balancing); or first define the right or freedom broadly and then determine, as a separate question, the reasonableness of limitations upon those rights

¹⁰⁷ This part of the Act was inserted by the Human Rights Amendment Act 2001. A breach of the Act triggers the various remedial provisions and procedures, as discussed above at 4.1.3 *The Human Rights Act 1993*.

¹⁰⁸ Butler, above n 39, 541-544.

(ad hoc balancing). Butler concludes that a purposive reading of the Act calls for the latter approach, based upon the structure of the legislation, the burden of proof under section 5, the consequence of greater transparency, comparative experiences and the very existence of section 5.

Having said this, it is important to recognise that the expression of some rights will call for a definitional *and* ad hoc approach. This is due to the fact that a number of provisions within the Bill of Rights contain internal modifiers. As illustrated by Butler, section 21 of the Act guarantees a right to be free from “unreasonable” searches and seizures and, similarly, section 9 protects the right to be free from “disproportionately” severe treatment or punishment.¹⁰⁹

The particular wording of section 5 discloses four further issues to be considered in its application.

4.4.2(b) Onus and standard of proof. First, section 5 allows limits “...as can be demonstrably justified...” in a free and democratic society. The question is: demonstrated by whom? The short answer is that the onus of proof rests on the party seeking to uphold the limitation.

Once the complainant of a NZBORA breach has established the existence of a *prima facie* rights violation (including the extent of any internal modification required),¹¹⁰ the onus of proving that the breach is justified under section 5 is placed on the party relying on section 5. This was held to be so by the Supreme Court of Canada in *Re Southam* (*No*

¹⁰⁹ Ibid, 544.

¹¹⁰ See above discussion concerning balance methodology.

1).¹¹¹ The New Zealand Court of Appeal has taken the same view, stating that it is for the party seeking reliance on section 5 to advance the argument that limits on rights are reasonable.¹¹² In *Solicitor-General v Radio New Zealand Ltd*, the onus of proof was again said to lie with the party relying on section 5.¹¹³ The Court added that the standard of proof is the civil standard of the balance of probability but that must be applied rigorously, consistent with the requirement that the restriction be demonstrably justified.¹¹⁴

The result of this burden and standard of proof upon the State to justify limits it places upon rights contributes to the transparency of rights limitations and what might be described as a culture of justification.¹¹⁵

4.4.2(c) *Reasonable “limitation”*. The reference in section 5 to “...reasonable limits...” means that the ‘limitations’ must be limitations and not more than that. This might seem to be a trite observation, but it has never been considered in New Zealand, although there is law on the point in Canada.

Canadian case law has drawn a distinction between “limits” and “exceptions”. In *Attorney General of Quebec v Quebec Association of Protestant School Boards*, the rule of non-justifiability was set out.¹¹⁶ In that case, section 72 of the Charter of the French Language (Bill 101)

¹¹¹ *Re Southam (No 1)* [1983] 41 OR (2d) 113, 124.

¹¹² *MOT v Noort; Police v Curran*, above n 62, 271 and 283.

¹¹³ *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48. Note that the position regarding the standard of proof is not as clear in Canada: see *KIS Films Inc v Vancouver* (1992) CRR (2d) 98, 113-114.

¹¹⁴ *Ibid*, 61. Consider also Butler’s consideration of the “intensity of review” in the application of section 5, above n 39, 561-564.

¹¹⁵ Above n 39, 550.

¹¹⁶ *Attorney General of Quebec v Quebec Association of Protestant School Boards* [1984] 2 SCR 66.

restricted the teaching of English. The Supreme Court held that this restriction amounted to an “exception” to a provision of the Charter of Rights. The Court stated that a prescription of law cannot create an exception to a provision of the Charter of Rights, nor can it purport to amend any provision thereof. It held that if a prescription collides directly with a provision of the Charter so as to negate it in whole, that prescription is not a “limit” capable of justification.¹¹⁷

The latter case was considered in *Ford v Quebec (Attorney General)* where the Supreme Court examined the distinction between “limits” and “exclusions” in more detail.¹¹⁸ The Court started by describing the *Quebec Association of Protestant School Boards* case as a “rare case of a truly complete denial of a guaranteed right or freedom” and, in doing so, recognised that most (if not all) legislative qualifications of a right or freedom will amount to a denial of the right or freedom to that limited extent.¹¹⁹ On the other hand, it said, a limit that permits no exercise of a guaranteed right or freedom in a limited area of its potential exercise is not justifiable.¹²⁰

To comply with this requirement, any limitation under an enactment must therefore not entirely exclude a right or freedom, although it may be rare to find a legislative provision that has such a strong effect, although section 4 of the NZBORA would act to ‘save’ the provision.

¹¹⁷ Ibid, 87.

¹¹⁸ *Ford v Quebec (Attorney General)* [1988] 2 SCR 712.

¹¹⁹ Ibid, 773.

¹²⁰ Ibid, 773-774.

4.4.2(d) *The limitation must be “prescribed by law”.* The wording of section 5 clearly requires any limitation to be “prescribed by law”. This expression was considered by the European Court of Human Rights in the *Sunday Times Case*, where the Court concluded that two requirements flowed from the expression:¹²¹

- (a) the law must be adequately accessible so that the citizen has an adequate indication of how “the law” limits his or her rights; and
- (b) the law must be formulated with sufficient precision so that the citizen can regulate his or her conduct.

The *Sunday Times* requirements were accepted and applied in New Zealand by the Indecent Publications Tribunal in *Re “Penthouse (US)” Vol 19 No 5 and others*.¹²² The test was later reaffirmed by the European Court in the case of *Silver v UK*.¹²³ Putting this test into a practical perspective, Le Dain J of the Supreme Court of Canada said that this included common law rules, statutes and regulations.¹²⁴ This consideration of the expression “prescribed by law” was approved by the NZCA in *MOT v Noort; Police v Curran*.¹²⁵

In Canada it has also been held that the “operating requirements” of a statute amount to a prescription by law. The term “operating requirements” refers to those limits on rights which are not expressed in a

¹²¹ *Sunday Times v United Kingdom* (1978) 58 ILR 491, 524-527.

¹²² *Re “Penthouse (US)” Vol 19 No 5 and others* 1 NZBORR 429.

¹²³ *Silver v UK* [1983] 5 EHRR 347.

¹²⁴ *R v Thomsen* (1988) 63 CR (3d) 1, 10. Regulations were also held to be satisfactory by the Supreme Court of Canada in *R v Therens* [1985] 1 SCR 613. Application of the *Sunday Times* test can be seen in *Re “Penthouse (US)” Vol 19 No 5 and others*, 1 NZBORR 429, where the Indecent Publications Tribunal of New Zealand held that policies based on statutory criteria satisfy the test. The European Court in *Silver v UK*, above n 123, found that while the Prison Act and Prison Rules (UK) met the criterion of adequate accessibility, unpublished orders and instructions did not.

¹²⁵ Above n 62, 272 and 283.

statute, nor implied, but which simply arise as a result of the practical operation of the enactment in the manner in which it was designed to operate. In *R v Therens*, a case concerning blood/breath alcohol legislation, it was held that the operating requirements of the Canadian statute meant that full opportunity to consult and instruct a lawyer was not possible, and that telephone access within a reasonable time only could be permitted.¹²⁶ In a very similar context, the New Zealand Court of Appeal in *MOT v Noort; Police v Curran* adopted this approach, holding that limits on rights resulting from the “operating requirements” of the Land Transport Act 1962 would constitute limits which were “prescribed by law”. The Court also noted that the concept of discerning “operating requirements” is to be seen in New Zealand as part of the interpretation process.¹²⁷

Notably, the second limb of the *Sunday Times* test (regarding the precise formulation of any limitation) has been applied to strike down powers or discretions that are so broad as to be considered “unfettered”. In *Ontario Film and Video Appreciation Society*, for example, the Ontario Court of Appeal held that a statute authorising film censorship failed to meet the requirements of a limitation “prescribed by law” because the censor board was given an unfettered discretion to ban or cut films.¹²⁸

4.4.2(e) *The substantive test under section 5.* Finally, the limitation in question must be shown to satisfy what is the very substance of section 5, i.e., that it is “...demonstrably justified in a free and democratic society”.

¹²⁶ *R v Therens* [1985] 1 SCR 613.

¹²⁷ Above n 62, 283 (per Richardson J).

¹²⁸ *Ontario Film and Video Appreciation Society* [1984] 45 OR (2d) 80.

To determine this issue, Canadian and New Zealand Courts have developed similar principles. The relevant authorities were discussed by a Full Court of the High Court in *Solicitor-General v Radio New Zealand Ltd.*¹²⁹ It was stated there that the starting point in applying the substantive test is *R v Oakes* where a detailed test was set out by the Supreme Court of Canada.¹³⁰ In an early formulation of the applicable test, the Supreme Court said that a limit will be reasonable and demonstrably justified in a free and democratic society if:¹³¹

- (i) the objective sought to be achieved by the limitation at hand must relate to concerns which are pressing and substantial in a free and democratic society; and
- (ii) the means utilised must be proportional or appropriate to the objective. In this connection there are three aspects:
 - 1. the limiting measures must be carefully designed or rationally connected to the objective;
 - 2. they must impair the right or freedom as little as possible;
 - 3. their effects must not so severely trench on individual or group rights that the objective of the limitation, albeit important, is nevertheless outweighed by the restriction of the right or freedom concerned.

Soon after *Oakes*, the Supreme Court restated the test to ask whether the provision being examined infringed a protected right or freedom “as little as *reasonably* possible” (rather than as *little* as possible).¹³² Interestingly, although the New Zealand High Court in *SG v Radio NZ Ltd* has adopted a

¹²⁹ Above n 113.

¹³⁰ *R v Oakes* (1986) 26 DLR (4th) 200.

¹³¹ That decision was later affirmed and followed by the Supreme Court of Canada in *Irwin Toy Ltd v Quebec (Attorney-General)* (1989) 58 DLR (4th) 577 and *Re A Reference re Public Service Employee Relations Act* [1987] 1 SCR 313, 373-374. The latter case was referred to with approval by the New Zealand Court of Appeal in *MOT v Noort; Police v Curran*, above n 62, 283. However, cases have moved away from requiring limitations to impair rights “as little as possible” (requirement (2) of the proportionality test) to a more flexible test of “as little as *reasonably* possible”.

¹³² *R v Edwards Books & Art Limited* [1986] 2 SCR 713, 772 (per Dickson CJ).

rephrased version of the *Oakes* test slightly, it retained the phrase “as little as possible” rather than “as little as reasonably possible”.¹³³

...To establish that the limit is both reasonable and demonstrably justified in a free and a democratic society the law creating the limit on the right of freedom must have an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom.

...The means chosen by the law to achieve the objective must be proportional and appropriate to be objective.

...To meet the requirement of the proportionality test there are three components. First, the limiting measures or the law must be designed to achieve the objective not being arbitrary, unfair or based on irrational considerations. This is described as being rationally connected to the objective. Second, the measures or the law should impair as little as possible the right or freedom. Third, there must be a proportionality between the effects of the measures or the law responsible for limiting the right or freedom and the objective. The law which restricts the right must not be so severe or so broad in application as to outweigh the objective. [emphasis added]

A point of distinction needs to be made when talking of impairing rights as little as possible. In the context of the current subject of limitations under section 5, and applying the *Radio NZ* case, a limitation will be proportionate if (with the other two components) it impairs the right or freedom “as little as possible”. In the context of the overall application of sections 4, 5 and 6, however, Andrew Butler properly talks about section 6 only demanding that the courts apply a meaning which “least reasonably limits” the NZBORA.¹³⁴ Why the difference in terminology (as little as

¹³³ Above n 113, 60-61. This was subsequently cited with approval in *Duff v Communicado Ltd* [1996] 2 NZLR 89. Note that in *MOT v Noort; Police v Curran*, Above n 62, 283, Richardson J said: “It is worth emphasising too that in principle an abridging inquiry under section 5 will properly involve consideration of all economic, administrative and social implications. In the end it is a matter of weighing (1) the significance in the particular case of the values underlying the Bill of Rights; (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights; (3) the limit sought to be placed on the application of the Bill provision in the particular case; and (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.”

possible versus least reasonably possible)? The point to make is that the expressions are entirely compatible with each other, since the first relates to the application of section 5 and the second relates to the application of section 6. In the latter situation, Butler's point concerns the use of section 6 to determine what meaning to give an enactment - section 6 requiring that "a meaning consistent with the rights and freedoms contained in this Bill of Rights... shall be preferred". He clarifies that this does not demand an interpretation of enactments that favours rights in their absolute form.¹³⁵

Rather, he says:

Because section 5 NZBORA is a step in the process which needs must *precede* the determination of a binding interpretation of the other enactment, section 6 can only demand the courts to interpret statutes subject to reasonable limits, not subject to the least possible limit that is linguistically available. [underlined emphasis added]

His analysis, it is posited, is both entirely correct and consistent with the *Radio NZ* description of the proportionality test. Butler is saying that section 5 (the reasonable limitations test) must be applied prior to determining what interpretation to favour under section 6. *Radio NZ* directs that in determining what amounts to a reasonable limit, the limitation must (to be proportional) limit the right as little as possible.

What should also be noted about the substantive application of section 5 and the tests described is that, as recognised by Justice Richardson in *Noort and Curran*,¹³⁶ they involve public policy analysis and value judgments on the part of the judiciary. In terms of the second,

¹³⁴ Butler, above n 39, 577 - discussed above at 4.3.2(a) *The unholy trinity of sections 4, 5 and 6*.

¹³⁵ A fear that had been expressed by Hardie Boys J in *MOT v Noort; Police v Curran*, above n 62, 287.

¹³⁶ *Ibid*, 283.

proportionality, limb of the test, it should also be noted that the wording of section 5 permits limitations that are “demonstrably justified”, rather than a more restrictive expression of limitations “necessary” to achieve certain objectives.¹³⁷ That the wording of section 5 thus permits a broader scope of restrictions, as has been recognised by both the High Court and Court of Appeal.¹³⁸ The greater flexibility of expressions such as “reasonable” versus “necessary” was also recognised by the European Court of Human Rights in the *Sunday Times Case*.¹³⁹ It appears that these issues were anticipated in the *White Paper* on the Bill of Rights:¹⁴⁰

In a great many cases where controversial issues arise for determination, there is no ‘right’ answer. The action taken by the Government of the day will depend upon its own political persuasions, and its assessment as to where the balance of the public interest lies. It is the very essence of democracy that it allows for people to hold differing views on controversial issues, and for the democratically elected Government of the day to adopt a standpoint thereon but for which of course it must take responsibility in the normal way at the next election. The basis test stated in Article 3 [now section 5 of the Act] means that in most cases the courts will leave it to Parliament to define the public interest, and to enact legislation encapsulating its decision. [emphasis added]

4.4.2(f) *A summary on section 5.* The reasonable limitations provision under section 5 of the New Zealand Bill of Rights Act is by no means a simple one, as evident through what has been a reasonably lengthy (albeit basic) overview of the provision. From this entirely abstract consideration of section 5,¹⁴¹ the following can be said of its composite requirements:

¹³⁷ As in article 4(1) of the International Covenant on Civil and Political Rights.

¹³⁸ See *Solicitor-General v Radio New Zealand Ltd*, above n 113, 62-63 (High Court, 1994) and *TVNZ v Quinn* [1996] 3 NZLR 23, 58 (Court of Appeal).

¹³⁹ Above n 62, 275.

¹⁴⁰ Above n 27, 45.

¹⁴¹ Which is deliberate on the part of the author, seeking to leave the contextual application of section 5 to Part II of this thesis.

- In the majority of cases, depending on the particular expression of the right or freedom being invoked, limitations upon rights should be based upon an ‘ad hoc’ balancing of rights - requiring a broad definition of the right in the first instance, followed by an enquiry as to whether limitations are reasonable under section 5.
- Once the party seeking to invoke the Bill of Rights has defined the right being invoked and demonstrated that it applies to the circumstances being complained of (Rishworth’s Step 1) and it has been determined that the enactment effects a limitation upon the right or freedom (Rishworth’s Step 2), the onus is then on the Crown to prove on the balance of probabilities that the limitation is justified under section 5 (Rishworth’s Steps 2 and 3).
- In doing so, it must be shown that the enactment effects a ‘limitation’ upon the right invoked and not an entire exclusion of it.
- The limitation must be “prescribed by law”, requiring it to be accessible, precise and in such terms that it does not establish powers or discretions that are so broad as to be unfettered.
- The limitation must pursue an objective which is pressing and substantial in a free and democratic society and do so by proportional means (the section 5 ‘substantive test’).

4.5 Conclusion

New Zealand's civil and political rights framework is established primarily through its party status to the International Covenant on Civil and Political Rights and, on a municipal level, through the New Zealand Bill of Rights Act 1990. Various implications arise through those instruments, from the impact of them upon statutory interpretation, to matters of reporting and the provision of effective remedies for breaches of human rights. The primary focus of this chapter has been upon the application of those instruments, not in any particular context, but in the abstract sense. Special attention has been paid to the issue of the limitation of rights.

Monitoring of compliance with the International Covenant occurs through the UN Human Rights Committee, a quasi-judicial body established under the ICCPR itself. The Committee receives and comments on periodic reports from States parties and, where a State is also a party to the First Optional Protocol to the Covenant, the Committee may also receive direct communications from individuals from within the State's territory. The ICCPR recognises within its preamble that individuals not only have rights, but also duties to other individuals and to the society within which they live. It does not, however, contain a general limitations provision, instead leaving the question of limitations upon rights to the particular expression of rights within the Covenant. The Covenant does, however, allow the temporary suspension of rights in situations where the life of the nation is threatened.

The application of the New Zealand Bill of Rights is a much more difficult enterprise. The operative provisions of the Act call for an intricate

methodology to be adopted in the examination of any perceived conflict between an enactment and the Bill of Rights. This chapter has chosen to adopt the methodology explained by Rishworth and others, applying sections 4, 5 and 6 through a four-step process. It has been posited that, in the case of regulations, the question of whether regulations are “enactments” within the meaning of sections 4 and 6 is not so important. The enquiry to be made is whether the regulations have been made in a manner that is consistent with the Bill of Rights so that they are not *ultra vires* the empowering provision (by application of section 6 of the NZBORA).

The four-step process identified calls for the application of section 5 of the Act, permitting reasonable limitations upon rights to be imposed, if prescribed by law and demonstrably justified in a free and democratic society. Once a party has defined the right being invoked and demonstrated that it applies to the circumstances being complained of, the onus is then upon the Crown to establish that the substantive test under section 5 is satisfied. Limitations must be “prescribed by law”, which will be the case with the legislative provisions being considered in this thesis, so long as the provisions do not confer an unfettered power or discretion. Application of substantive test under section 5 requires that the limitation under the enactment pursues a pressing and substantial objective in a free and democratic society and does so by proportional means.

Part Two:

The Interface between Counter-Terrorism
and Human Rights

Chapter 5

The Interface between Counter-Terrorism and Human Rights

Apparent from Part I of this thesis are a number of important points. First, the international community has long been active in countering terrorist conduct, being conduct identified by that community, and expressly by the United Nations Security Council, as a threat to international peace and security.¹ Flowing from that, New Zealand has a number of international obligations to counter terrorism, stemming from Security Council resolutions and from New Zealand's party status to the twelve principal anti-terrorism conventions.² In compliance with those obligations, New Zealand has enacted various items of legislation, each of which advance counter-terrorism to various degrees. This is primarily through seven items of legislation, including regulations made under the United Nations Act 1946.³ This legislation has been identified as having the potential to impact upon various rights and freedoms guaranteed under the International Covenant on Civil and Political Rights (ICCPR) and the New Zealand Bill of Rights Act 1990 (NZBORA).⁴ New Zealand's human rights framework, complemented by its international human rights obligations and external review mechanisms, is reasonably extensive while at

¹ See Chapter Two, New Zealand's International Counter-Terrorist Obligations.

² See Chapter Three, New Zealand's Domestic Counter-Terrorist Legislation, Part A.

³ See Chapter Three, New Zealand's Domestic Counter-Terrorist Legislation, Part B.

⁴ See Chapter Three, New Zealand's Domestic Counter-Terrorist Legislation, 3.14 Potential Civil and Political Rights Issues.

the same time providing the scope for the limitation of rights when advancing pressing concerns in a free and democratic society.⁵

This chapter is the first of Part II of the thesis. While Part I looked at extant obligations and law, thereby seeking to lay the foundation for a more detailed examination of the interface between human rights and counter-terrorism, Part II will now consider that interface in detail. The first step in doing so, and the subject of this chapter, is to consider what principles are to be applied in the examination of any perceived conflicts between counter-terrorism and civil and political rights.

Five questions are to be addressed, in two main parts to the chapter (one expository and the other analytical). The first two questions are approached in a reasonably descriptive way, providing an overview of relevant United Nations resolutions and other significant documents, thereby establishing a platform for the analysis of the critical issues in this chapter. First, having identified in Part I of the thesis that human rights appear to be adversely impacted upon by counter-terrorism, what can be said about the impact of terrorism upon human rights? Secondly, is compliance with human rights necessary when countering terrorism? It will be concluded that terrorism adversely impacts upon both security and human rights (perhaps not surprisingly) but that, despite this adverse impact, the means by which counter-terrorist measures are implemented must be in compliance with human rights.

Having arrived at this position, this chapter then considers what are the questions vital to Part II of the thesis: the assessment of New Zealand's

⁵ See Chapter Four, Civil and Political Rights in New Zealand.

counter-terrorist legislation against New Zealand's international and domestic human rights framework. To start with, this will be undertaken in the context of the International Covenant, then under the New Zealand Bill of Rights. Consideration will then be given to how the latter two instruments are to interact and what, in particular, the consequences would be of finding counter-terrorist legislation as being valid under one, but not the other, instrument.

What should be made clear at this point is that this chapter does not seek to undertake analyses of specific types of counter-terrorist measures and how they might or might not fit within the human rights framework discussed in the preceding chapter. That level of analysis is left to Chapters Seven, Eight and Nine, which consider those aspects of New Zealand's counter-terrorist legislation identified in Part I of the thesis as requiring examination. This chapter seeks to establish the *principles* to be applied when undertaking that examination.

5.1 The Impact of Terrorism on Security and Human Rights

To say that terrorism can adversely impact upon security (whether international or territorial) and upon human rights is to state the obvious. The events and consequences of the September 11 terrorist attacks are a clear illustration of this. Approximately 3,000 lives were lost, the right to life being the most fundamental of human rights. The territorial integrity of the United States was compromised through the attacks upon the World Trade Centre and the Pentagon. International security also felt the adverse consequences of the attacks, ultimately resulting in the multinational military intervention in Afghanistan under *Operation Enduring Freedom*.

As discussed in Chapter Two, terrorism, its impact, and its suppression have been issues within the focus of the United Nations since ‘modern’, transnational, acts of terrorism came to international attention in the late 1960s and early 1970s with the advent of a series of aircraft hijackings and the attempted kidnapping of athletes at the Munich Olympic Games.⁶ It is relevant, in that regard, to consider what the United Nations has said about terrorism and its impact upon security and human rights. Although much of what is observed is obvious, some of the statements are worth noting and some commenting upon. In a reasonably linear fashion, this part of the chapter will consider the resolutions of the Security Council, General Assembly and Commission on Human Rights. Before doing so, it is relevant to note that the recent report of the High-level Panel on Threats, Challenges and Change (established by the United Nations Secretary-General) also briefly addressed the impact of terrorism:⁷

Terrorism attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rules of war that protect civilians; tolerance among people and nations; and the peaceful resolution of conflict.

5.1.1 Security Council Resolutions

As discussed within Chapter Two, the UN Security Council has long been active in considering the issue of terrorism⁸ and there are a host of individual resolutions in which terrorism is mentioned or specifically addressed by the Council. Something that should be remembered in considering the language

⁶ Chapter Two, 2.2 International Conventions on Counter-Terrorism.

⁷ Report of the High-level Panel on Threats, Challenges and Change, Annex to the United Nations General Assembly’s Fifty-ninth Session, Agenda item 55 of 2 December 2004, A/59/656, para 145.

⁸ Chapter Two, 2.3.2 *United Nations Security Council*.

and content of these resolutions is the role of the Security Council. Under article 24 of the Charter of the United Nations, the Security Council is charged with the maintenance of international peace and security, paragraph 1 providing that:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

That role is reflected in the language and scope of Security Council resolutions on terrorism which, compared with General Assembly resolutions on the subject, are much narrower in focus.⁹ In general terms, Security Council resolutions concern themselves with the adverse impacts of terrorism upon the security of States and the maintenance of peaceful relations, while the General Assembly takes a much broader approach to the subject given its plenary role and wider mandate.¹⁰

Having made this point, it is interesting to note that the most recent resolution of the Security Council, as at the beginning of 2005, makes mention of the impact of terrorism upon both security and human rights. The preamble to Security Council Resolution 1566 states:¹¹

Reaffirming that terrorism in all of its forms and manifestations constitutes one of the most serious threats to peace and security,

Considering that acts of terrorism seriously impair the enjoyment of human rights and threaten the social and economic development of all States and undermine global stability and prosperity,

⁹ General Assembly resolutions are to be discussed below, at 5.1.2 *General Assembly and Commission on Human Rights Resolutions*.

¹⁰ See articles 10 to 17 of the Charter of the United Nations, which sets out the powers and functions of the United Nations General Assembly.

¹¹ United Nations Security Council Resolution 1566 of 8 October 2004, S/RES/1566 (2004), preambular paras 7 and 8.

This attention upon human rights is, however, a rare one. It is the only resolution of the Council to mention human rights since September 11. All other resolutions during that time focus upon, and repeatedly reaffirm, the notion that terrorism is a threat to international peace and security.¹² Of those resolutions, a number warrant specific mention. First of all are the two resolutions of the Council which immediately followed the September 11 attacks. Resolutions 1368 and 1373 both said that terrorism caused threats to international peace and security, the latter Resolution going a little further:¹³

Reaffirming further that such acts [the terrorist attacks of 11 September 2001], like any act of international terrorism, constitute a threat to international peace and security, [emphasis added]

The author considers that some qualifications need to be made about this assertion. Although the events of September 11 clearly did constitute a threat to and breach of international peace and security, it is difficult to see that “any act of international terrorism” will necessarily do so. An act of international terrorism will no doubt always be seen as both a threat to and breach of international peace, since the ‘international’ nature of such terrorism will involve an incursion upon the territorial integrity of the State in which the act

¹² From most recent in time through to resolutions dating back to September 11, 2001, see United Nations Security Council Resolutions 1535 of 26 March 2004, S/RES/1535 (2004), preambular para 2; 1530 of 11 March 2004, S/RES/1530 (2004), preambular para 2; 1526 of 30 January 2004, S/RES/1526 (2004), preambular para 3; 1456 of 21 January 2003, S/RES/1456 (2003), preambular para 1; 1455 of 17 January 2003, S/RES/1455 (2003), preambular para 7; 1450 of 13 December 2002, S/RES/1450 (2002), preambular para 4; 1440 of 24 October 2002, S/RES/1440 (2002), preambular para 2; 1438 of 14 October 2002, S/RES/1438 (2002), preambular para 2; 1390 of 28 January 2002, S/RES/1390 (2002), preambular para 9; 1377 of 12 November 2001, S/RES/1377 (2001), preambular para 2; 1373 of 28 September 2001, S/RES/1373 (2001), preambular para 3; and 1368 of 12 September 2001, S/RES/1368 (2001), operative para 1.

¹³ United Nations Security Council Resolutions 1368 of 12 September 2001, S/RES/1368 (2001), preambular para 2 and operative para 1; and 1373 of 28 September 2001, S/RES/1373 (2001), preambular para 3.

occurs. Such an act need not, however, constitute a breach of international security, although it is likely to constitute a threat to such security.¹⁴ Much will depend, it is posited, upon the way in which the terrorist event is dealt with by both the State attacked and any States in which the terrorists reside or have fled to.

It is important to reflect that these statements of the Security Council do not otherwise appear to be an over-reaction to the events of September 11. Two resolutions of the Council, made prior to the September 11 attacks, are prominent in that regard. Resolution 1269 of 1999 expressed concern over the fact that terrorism endangers lives and the well being of individuals, as well as the security of States.¹⁵ Following the 1998 embassy bombings in Nairobi, Kenya and Dar-es-Salaam in Tanzania, Resolution 1189 condemned the bombings and described them as having a damaging effect on international relations and jeopardising the security of States.¹⁶ Most influentially, both resolutions declare that the suppression of the acts of international terrorism is essential to the maintenance of peace and security.¹⁷

5.1.2 General Assembly and Commission on Human Rights Resolutions

Since December 1972, the UN General Assembly has adopted a series of resolutions concerning terrorism. Those resolutions take the form of the

¹⁴ Within the meaning of the terminology used in article 39 of the Charter of the United Nations.

¹⁵ United Nations Security Council Resolution 1269 of 19 October 1999, S/RES/1269 (1999), preambular para 1.

¹⁶ United Nations Security Council Resolution 1189 of 18 August 1998, S/RES/1189 (1998), preambular para 2.

¹⁷ United Nations Security Council Resolutions 1189 of 18 August 1998, S/RES/1189 (1998), preambular para 3; and 1269 of 19 October 1999, S/RES/1269 (1999), preambular para 8.

Assembly's adoption of measures to eliminate international terrorism¹⁸ and resolutions addressing the topic of terrorism and human rights.¹⁹ Taking a

¹⁸ The very first resolution of the General Assembly concerning itself solely with the issue of terrorism was adopted on 18 December 1972 against the background of the disruption of the 1972 Olympic Games at Munich: United Nations General Assembly Resolution 3034 (XXVII) of 18 December 1972, A/RES/27/3034. Its very title illustrates the overwhelming view that terrorism is a matter affecting security and the enjoyment of rights: "Measures to prevent international terrorism which endangers or takes innocent lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice lives, including their own, in an attempt to effect radical changes". The same title was used to name eight subsequent resolutions of the General Assembly, from 1976 to 1989: United Nations General Assembly Resolutions 31/102 of 15 December 1976, A/RES/31/102; 32/147 of 16 December 1977, A/RES/32/147; 34/145 of 17 December 1979, A/RES/34/145; 36/109 of 10 December 1981, A/RES/36/109; 38/130 of 19 December 1983, A/RES/38/130; 40/61 of 9 December 1985, A/RES/40/61; 42/159 of 7 December 1987, A/RES/42/159; and 44/29 of 4 December 1989, A/RES/44/29. The last decade has seen the Assembly adopt a *Declaration on Measures to Eliminate International Terrorism*, first adopted in early December 1994 under its Resolution 49/60: United Nations General Assembly Resolution 49/60 of 9 December 1994, A/RES/49/60. The Declaration was based on the notion of peace and security and the principle of refraining from the threat or use of force in international relations (through its preamble). It called on States to refrain from organizing, instigating, assisting or participating in terrorist acts, and from acquiescing in or encouraging activities within their territories directed towards the commission of such acts (para 4). Significantly, for the purpose of this chapter, Resolution 49/60 pronounced that terrorism constitutes a grave violation of the purpose and principles of the United Nations (para 2). The Declaration was reaffirmed in the following two years, with a Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism adopted in 1996: United Nations General Assembly Resolution 51/210 of 17 December 1996, A/RES/51/210, Annex. The Declaration and Supplement were reaffirmed within United Nations General Assembly Resolutions 52/165 of 19 January 1998, A/RES/52/165, para 7, 54/110 of 2 February 2000, A/RES/54/110, para 8; 55/158 of 30 January 2001, A/RES/55/158, para 9; 56/88 of 24 January 2002, A/RES/56/88, para 10; 57/27 of 15 January 2003, A/RES/57/27, para 10; 58/81 of 8 January 2004, A/RES/58/81, para 10; and 59/46 of 2 December 2004, A/RES/59/46, para 12. In one of the more recent resolutions on measures to eliminate international terrorism, attention was also paid to the link between terrorism and other forms of crime: United Nations General Assembly Resolution 58/136 of 26 January 2004, A/RES/58/136, preambular para 8.

¹⁹ The second series of General Assembly resolutions began in late December 1993, with the Assembly adopting Resolution 48/122, entitled "Terrorism and Human Rights": United Nations General Assembly Resolution 48/122 of 20 December 1993, A/RES/48/122. Echoing many of the expressions of concern contained in the declarations on measures to eliminate terrorism, the preamble to this later Resolution spoke of the serious concern of the General Assembly at the gross violations of human rights perpetrated by terrorist groups. Resolutions of 1995, 1996, 2000, 2002 and 2004 did the same, adding that terrorism creates an environment that destroys the right of people to live in freedom from fear: United Nations General Assembly

broader approach than the Security Council's resolutions, both types of General Assembly resolutions state and reaffirm the idea that terrorism is a threat to the maintenance of peace and security, and to the enjoyment of human rights.

In 1994, the Commission on Human Rights²⁰ adopted Resolution 1994/46 on Terrorism and Human Rights, what was to become a series of annual resolutions on the subject. Again for the sake of emphasising that resolutions of the Commission on Human Rights concerning the impact of terrorism upon human rights cannot be seen as an excessive response to September 11, it is useful to consider those resolutions prior to and after September 11. Resolutions of the Commission on the subject were not too different from year to year.²¹ Less than five months prior to the September 11 attacks, the Commission on Human Rights adopted Resolution 2001/37, in which the

Resolutions 50/186 of 22 December 1995, A/RES/50/186, preambular paras 3, 4, 5 and 11, and operative para 2; 52/133 of 27 February 1998, A/RES/52/133, preambular paras 6, 7, 8 and 10, and operative para 3; and 54/164 of 24 February 2000, A/RES/54/164, preambular paras 7, 8, 9 and 12, and operative para 3; 56/160 of 13 February 2002, A/RES/56/160, preambular paras 11, 12 and 13; and 58/174 of 10 March 2004, A/RES/58/174, preambular paras 12, 13 and 14. The preamble to the Assembly's Resolution 56/160 added (para 24): "Noting the growing consciousness within the international community of the negative effects of terrorism in all its forms and manifestations on the full enjoyment of human rights and fundamental freedoms and on the establishment of the rule of law and domestic freedoms as enshrined in the Charter of the United Nations and the International Covenants on Human Rights".

²⁰ The Commission on Human Rights is a functional commission of the United Nations Economic and Social Council, the Council being one of the principal organs of the United Nations: see article 7(1) of the Charter of the United Nations. The functions and powers of the Economic and Social Council are set out within articles 62 to 66 of the Charter.

²¹ Following Commission on Human Rights Resolution 1994/46, and up to 11 September 2001, seven further resolutions were adopted: Commission on Human Rights Resolutions 1995/43 of 3 March 1995, E/CN.4/RES/1995/43; 1996/47 of 19 April 1996, E/CN.4/RES/1996/47; 1997/42 of 11 April 1997, E/CN.4/RES/1997/42; 1998/47 of 17 April 1998, E/CN.4/RES/1998/47; 1999/27 of 23 April 1999, E/CN.4/RES/1999/27; 2000/30 of 20 April 2000, E/CN.4/RES/2000/30; and 2001/37 of 23 April 2001, E/CN.4/RES/2001/37.

following preambular and operative paragraphs addressed the impact of terrorism upon human rights:²²

Regretting that the negative impact of terrorism, in all its dimensions, on human rights continues to remain alarming, despite national and international efforts to combat it,

Convinced that terrorism, in all its forms and manifestations, wherever and by whomever committed, can never be justified in any instance, including as a means to promote and protect human rights,

Bearing in mind that the most essential and basic human right is the right to life,

Bearing in mind also that terrorism creates an environment that destroys the freedom from fear of the people,

Bearing in mind further that terrorism in many cases poses a severe challenge to democracy, civil society and the rule of law,

Profoundly deploring the large number of innocent persons, including women, children and the elderly, killed, massacred and maimed by terrorists in indiscriminate and random acts of violence and terror, which cannot be justified under any circumstances,

Seriously concerned at the gross violations of human rights perpetrated by terrorist groups,

Taking note of the growing consciousness of the international community of the negative effects of terrorism in all its forms and manifestations on the full enjoyment of human rights and fundamental freedoms and on the establishment of the rule of law and democratic freedoms as enshrined in the Charter and the International Covenants on Human Rights,

1. *Reiterates its unequivocal condemnation* of all acts, methods and practices of terrorism, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, as acts aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and the rule of law and having adverse consequences for the economic and social development of the State;

2. *Condemns* the violations of the right to live free from fear and of the right to life, liberty and security;

²² Commission on Human Rights Resolution 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, preambular paras 10 to 14, 16, 22 and 23, and operative paras 1 and 2.

Just 17 days prior to September 11, the Commission on Human Rights' Sub-Commission on the Promotion and Protection of Human Rights reiterated a number of those sentiments²³ and welcomed a report of the Sub-Commission's Special Rapporteur. Within her report of June 2001, Special Rapporteur Koufa also paid attention to the impact of terrorism on human rights, noting in particular its links to international and transnational crime and its threat to life and the safety of persons.²⁴ Little has changed in the resolutions of the Commission on this subject since September 11. One of the most recent resolutions, 2004/44, contains much of what was said prior to September 11 and goes no further on the issue of the impact of terrorism upon human rights.²⁵

5.1.3 An Overview of United Nations Observations

Against the background of the resolutions of the Security Council, General Assembly and Commission on Human Rights, it is perfectly clear that terrorism is recognised as having an adverse impact upon both human rights and upon international security and good order. Taking all of the resolutions

²³ Sub-Commission on Human Rights Resolution 2001/18 of 16 August 2001, E/CN.4/Sub.2/2001/18, preambular paras 5 to 10 (reflecting preambular paras 10 to 14 of Commission on Human Rights Resolution 2001/37 of 23 April 2001, E/CN.4/RES/2001/37).

²⁴ Koufa KK (as Special Rapporteur), *Progress Report on Terrorism and Human*, 27 June 2001, E/CN.4/Sub.2/2001/31, paras 104, 105 and 107.

²⁵ Commission on Human Rights Resolution 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, preambular paras 7, 12, 13 and 23, and operative paras 1 and 2.

of those bodies together, the observations made within those resolutions can be summarised by saying that terrorism is seen as something that:

- has links with transnational organized crime, drug trafficking, money-laundering, and trafficking in arms as well as illegal transfers of nuclear, chemical and biological materials;²⁶
- is linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, the taking of hostages and robbery;²⁷
- endangers or takes innocent lives;²⁸
- creates an environment that destroys the freedom from fear of the people;²⁹

²⁶ United Nations Security Council Resolutions 1373 of 28 September 2001, S/RES/1373 (2001), para 4; 1456 of 20 January 2003, S/RES/1456 (2003), preambular paras 3 and 6; and 1540 of 28 April 2004, S/RES/1540 (2004), preambular para 8. See also United Nations General Assembly Resolution 58/136 of 26 January 2004, A/RES/58/136, preambular para 8. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, preambular para 16; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, preambular para 7. See also Koufa KK, above n 23, paras 104 and 105.

²⁷ United Nations General Assembly Resolutions 48/122 of 20 December 1993, A/RES/48/122, preambular para 7; 49/185 of 23 December 1994, A/RES/49/185, preambular para 9; 50/186 of 22 December 1995, A/RES/50/186, preambular para 12 and operative para 2; 52/133 of 27 February 1998, preambular para 11; 54/164 of 24 February 2000, preambular para 13; 56/160 of 13 February 2002, A/RES/56/160, preambular para 18; and 58/174 of 10 March 2004, A/RES/58/174, para 12. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, preambular para 16; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, preambular para 7. See also Koufa KK, above n 23, paras 104 and 105.

²⁸ United Nations Security Council Resolutions 1269 of 19 October 1999, S/RES/1269 (1999), preambular para 1; and 1377 of 12 November 2001, S/RES/1377 (2001), Annex (Declaration), para 6. See also the title to United Nations General Assembly Resolutions 27/3034 to 44/29, as listed above n 17, and the first operative provisions of United Nations General Assembly Resolutions 3034 (XXVII) of 18 December 1972, A/RES/27/3034; 31/102 of 15 December 1976, A/RES/31/102; 32/147 of 16 December 1977, A/RES/32/147; 34/145 of 17 December 1979, A/RES/34/145; and 36/109 of 10 December 1981, A/RES/36/109. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, para 2; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, preambular para 7. See also Koufa KK, above n 23, para 107.

- threatens the dignity and security of human beings everywhere;³⁰
- has an adverse effect on the establishment of the rule of law;³¹
- jeopardises fundamental freedoms;³²
- aims at the destruction of human rights;³³
- undermines pluralistic civil society;³⁴

²⁹ United Nations General Assembly Resolutions 50/186 of 22 December 1995, A/RES/50/186, preambular para 5; 52/133 of 27 February 1998, A/RES/52/133, preambular para 8; and 54/164 of 24 February 2000, A/RES/54/164, preambular para 9. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, preambular para 12, and operative para 2; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, preambular para 12. See also Sub-Commission on Human Rights Resolution 2001/18 of 16 August 2001, E/CN.4/Sub.2/2001/18, preambular para 8.

³⁰ United Nations Security Council Resolution 1377 of 12 November 2001, S/RES/1377 (2001), Annex (Declaration), para 6. See also Commission on Human Rights Resolution 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, para 2. See also Koufa KK, above n 23, para 107.

³¹ United Nations General Assembly Resolution 56/160 of 13 February 2002, A/RES/56/160, preambular para 24. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, preambular para 13, and operative para 1; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, preambular para 13. See also Sub-Commission on Human Rights Resolution 2001/18 of 16 August 2001, E/CN.4/Sub.2/2001/18, preambular para 9.

³² See the title to United Nations General Assembly Resolutions 27/3034 to 44/29, as listed above n 17. See also United Nations General Assembly Resolutions 48/122 of 20 December 1993, A/RES/48/122, para 1; 49/185 of 23 December 1994, A/RES/49/185, para 1; 50/186 of 22 December 1995, A/RES/50/186, para 2; 52/133 of 27 February 1998, A/RES/52/133, para 3; 56/160 of 13 February 2002, A/RES/56/160, preambular para 24 and para 3; and 58/174 of 10 March 2004, A/RES/58/174, para 1. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, preambular para 23, and operative para 1; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, preambular para 12, and operative para 1.

³³ As recognised in the first-stated Declaration on Measures to Eliminate International Terrorism, above n 17, operative para 2. See also United Nations General Assembly Resolutions 48/122 of 20 December 1993, A/RES/48/122, para 1; 49/185 of 23 December 1994, A/RES/49/185, para 1; 50/186 of 22 December 1995, A/RES/50/186, para 2; 52/133 of 27 February 1998, A/RES/52/133, para 3; 56/160 of 13 February 2002, A/RES/56/160, preambular para 24 and operative para 3; and 58/174 of 10 March 2004, A/RES/58/174, para 1. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, preambular para 23, and operative para 1; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, preambular para 12 and 23, and operative para 1. See also Report of the High-level Panel on Threats, Challenges and Change, Annex to the United Nations General Assembly's Fifty-ninth Session, Agenda item 55 of 2 December 2004, A/59/656, para 145.

- aims at the destruction of the democratic bases of society;³⁵
- destabilises legitimately constituted Governments;³⁶
- has adverse consequences on the economic and social development of States;³⁷

³⁴ As recognised in the first-stated Declaration on Measures to Eliminate International Terrorism, above n 17, operative para 2. See also United Nations General Assembly Resolutions 48/122 of 20 December 1993, A/RES/48/122, para 1; 49/185 of 23 December 1994, A/RES/49/185, para 1; 50/186 of 22 December 1995, A/RES/50/186, para 2; 52/133 of 27 February 1998, A/RES/52/133, para 3; 56/160 of 13 February 2002, A/RES/56/160, preambular para 24 and operative para 3; and 58/174 of 10 March 2004, A/RES/58/174, para 1. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, para 1; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, para 1. See also Report of the High-level Panel on Threats, Challenges and Change, Annex to the United Nations General Assembly's Fifty-ninth Session, Agenda item 55 of 2 December 2004, A/59/656, para 145.

³⁵ As recognised in the first-stated Declaration on Measures to Eliminate International Terrorism, above n 17, operative para 2. See also United Nations General Assembly Resolutions 48/122 of 20 December 1993, A/RES/48/122, para 1; 49/185 of 23 December 1994, A/RES/49/185, para 1; 50/186 of 22 December 1995, A/RES/50/186, para 2; 52/133 of 27 February 1998, A/RES/52/133, para 3; 56/160 of 13 February 2002, A/RES/56/160, para 3; and 58/174 of 10 March 2004, A/RES/58/174, para 1. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, preambular para 13; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, preambular para 13, and operative para 1. See also Sub-Commission on Human Rights Resolution 2001/18 of 16 August 2001, E/CN.4/Sub.2/2001/18, preambular para 9.

³⁶ United Nations General Assembly Resolutions 48/122 of 20 December 1993, A/RES/48/122, para 1; 49/185 of 23 December 1994, A/RES/48/122 of 23 December 1994, para 1; 50/186 of 22 December 1995, A/RES/50/186, para 2; 52/133 of 27 February 1998, A/RES/52/133, para 3; 56/160 of 13 February 2002, A/RES/56/160, para 3; and 58/174 of 10 March 2004, A/RES/58/174, para 1. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, para 1; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, para 1.

³⁷ United Nations General Assembly Resolutions 48/122 of 20 December 1993, A/RES/48/122, para 1; 49/185 of 23 December 1994, A/RES/48/122 of 23 December 1994, para 1; 50/186 of 22 December 1995, A/RES/50/186, para 2; 52/133 of 27 February 1998, A/RES/52/133, para 3; 56/160 of 13 February 2002, A/RES/56/160, para 3; and 58/174 of 10 March 2004, A/RES/58/174, para 1. See also United Nations Security Council Resolution 1377 of 12 November 2001, S/RES/1377 (2001), Annex (Declaration), para 6. See also United Nations General Assembly Resolutions 50/186 of 22 December 1995, A/RES/50/186, para 2; 52/133 of 27 February 1998, A/RES/52/133, para 3; 56/160 of 13 February 2002, A/RES/56/160, para 3; and 58/174 of 10 March 2004, A/RES/58/174, para 1. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, para 1; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, para 1.

- constitutes a grave violation of the purpose and principles of the United Nations;³⁸
- jeopardises friendly relations among States;³⁹
- has a pernicious impact upon relations of co-operation among States, including co-operation for development;⁴⁰
- threatens the territorial integrity and security of States;⁴¹
- is a threat to international peace and security;⁴² and

³⁸ United Nations Security Council Resolutions 1189 of 13 August 1998, S/RES/1189 (1998), preambular para 2; 1373 of 28 September 2001, S/RES/1373 (2001), para 5; and 1377 of 12 November 2001, S/RES/1377 (2001), Annex (Declaration), para 5. See also the title to United Nations General Assembly Resolutions 27/3034 to 44/29, as listed above n 17, operative para 2; and United Nations General Assembly Resolution 51/210 of 17 December 1996, A/RES/51/210, para 2. See also Report of the High-level Panel on Threats, Challenges and Change, Annex to the United Nations General Assembly's Fifty-ninth Session, Agenda item 55 of 2 December 2004, A/59/656, para 145.

³⁹ See the first operative paras of United Nations General Assembly Resolutions 38/130 of 19 December 1983, A/RES/38/130; 40/61 of 9 December 1985, A/RES/40/61; 42/159 of 7 December 1987, A/RES/42/159; 44/29 of 4 December 1989, A/RES/44/29; and 51/210 of 17 December 1996. See also Report of the High-level Panel on Threats, Challenges and Change, Annex to the United Nations General Assembly's Fifty-ninth Session, Agenda item 55 of 2 December 2004, A/59/656, para 145.

⁴⁰ See United Nations General Assembly Resolution 38/130 of 19 December 1983, A/RES/38/130, para 1. See also the third operative paras of United Nations General Assembly Resolutions 40/61 of 9 December 1985, A/RES/40/61; 42/159 of 7 December 1987, A/RES/42/159; and 44/29 of 4 December 1989, A/RES/44/29.

⁴¹ United Nations Security Council Resolutions 1189 of 13 August 1998, S/RES/1189 (1998), preambular para 2; and 1377 of 12 November 2001, S/RES/1377 (2001), Annex (Declaration), para 3. As also recognised in the first-stated Declaration on Measures to Eliminate International Terrorism, above n 17, preambular para 3 and operative para 1. See also United Nations General Assembly Resolutions 48/122 of 20 December 1993, A/RES/48/122, para 1; and 49/185 of 23 December 1994, A/RES/49/185, para 1. See also Commission on Human Rights Resolutions 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, para 1; and 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, para 1. and 51/210 of 17 December 1996, A/RES/51/210, para 1.

⁴² United Nations Security Council Resolutions 1566 of 8 October 2004, S/RES/1566 (2004), preambular para 7; 1535 of 26 March 2004, S/RES/1535 (2004), preambular para 2; 1530 of 11 March 2004, S/RES/1530 (2004), preambular para 2; 1526 of 30 January 2004, S/RES/1526 (2004), preambular para 3; 1456 of 21 January 2003, S/RES/1456 (2003), preambular para 1; 1455 of 17 January 2003, S/RES/1455 (2003), preambular para 7; 1450 of 13 December 2002, S/RES/1450 (2002), preambular para 7.

- must be suppressed as an essential element for the maintenance of international peace and security.⁴³

As already stated, some of these points are obvious. Notwithstanding this, they add an international context to the idea that counter-terrorism is a pressing and substantial objective to be pursued in a free and democratic society. In some instances, in fact, they go further. Some observations go to what might be described as the 'life and security' of States. Others reach further still, reflecting upon the international relations, security and good order of the world at large. These different 'levels' of threat are important and will be discussed further in the context of discussing the proportionality between the objective of counter-terrorism and the means by which that objective is implemented.⁴⁴

5.2 Is Compliance with Human Rights Necessary?

The position so far can be summarised as follows. There are concerns throughout civil society that the means by which States have implemented counter-terrorist measures may be excessive and in numerous instances adversely impact upon rights and freedoms. At the same time, terrorism itself

(2002), preambular para 4; 1440 of 24 October 2002, S/RES/1440 (2002), preambular para 2; 1438 of 14 October 2002, S/RES/1438 (2002), preambular para 2; 1390 of 28 January 2002, S/RES/1390 (2002), preambular para 9; 1377 of 12 November 2001, S/RES/1377 (2001), preambular para 2; 1373 of 28 September 2001, S/RES/1373 (2001), preambular para 3; 1368 of 12 September 2001, S/RES/1368 (2001), operative para 1; 1269 of 19 October 1999, S/RES/1269 (1999), preambular para 1; and 1189 of 13 August 1998, S/RES/1189 (1998), preambular para 2.

⁴³ United Nations Security Council Resolutions 1189 of 13 August 1998, S/RES/1189 (1998), preambular para 3; and 1269 of 19 October 1999, S/RES/1269 (1999), preambular para 8. See also United Nations General Assembly Resolutions 27/3034 to 44/29, as listed above n 17, preambular para 8.

⁴⁴ Discussed below, 5.4.3 *Proportionality*.

is something that impacts negatively upon human rights, democracy and international peace and security and, accordingly, the combating of terrorism must be treated as an important objective. Thus we come to the crux of this thesis. A conflict of wills is exposed: the desire to maintain peace and security, including the preservation of pluralistic democracies and the rights of innocents that might be the physical subjects of terrorist attacks; versus the desire to maintain and promote human rights and the rule of law in the conduct of international relations and the governance by States of their people. Are the two objectives compatible? Indeed, is compliance with human rights standards necessary when pursuing an objective as important as counter-terrorism? Given the war-like nature of terrorist conduct, should Cicero's statement, *inter arma silent leges* (in time of war laws are silent), be adopted?⁴⁵

Having earlier considered resolutions of the United Nations Commission for Human Rights, the statement of High Commissioner Mary Robinson evidences further support for the notion that countering terrorism is an objective of significant importance, but at the same time warns that the means of achieving this must be measured:⁴⁶

Terrorism is a threat to the most fundamental human rights. Finding common approaches to countering terrorism serves the cause of human rights. Some have suggested that it is not possible to effectively eliminate terrorism while respecting human rights. This suggestion is fundamentally flawed. The only long-term guarantor of security is

⁴⁵ Cicero, *Oratio Pro Annio Milone* – see Everitt A, *Cicero: The Life and Times of Rome's Greatest Politician*, (Random House Inc, 2001), 96. For further discussion, see also Torres D, *Inter Arma Silent Leges: An Examination of the Legal Rights of American Citizens Detained as Enemy Combatants in the War on Terror*, (2003) 3 The Journal of Philosophy, Science and Law, URL <www.psljournal.com/archives/papers/interarma.cfm> at 25 January 2005.

⁴⁶ Robinson M, 'Terrorism and Human Rights', Press Release from the United Nations Office of the High Commissioner for Human Rights, 20 March 2002.

through ensuring respect for human rights and humanitarian law. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends.

More recently, the Secretary General of the Pacific Islands Forum Secretariat said this:⁴⁷

...for all its immediacy, how we respond to this threat [terrorism] should not become disembodied from still broader issues, which are about how we want our societies to be and to operate, about our values, our liberties and our social obligations. That, after all, is what we are defending in the first place. The cure should never be worse than the disease.

Against the background of these warnings, and the earlier observations of the adverse impact that some counter-terrorist measures appear to be having upon civil liberties,⁴⁸ this chapter will next turn to consider the means by which limiting measures might be accommodated under the International Covenant on Civil and Political Rights and under New Zealand's Bill of Rights. Before doing so, it is important to note that both the Security Council and the General Assembly, as well as other prominent bodies, have stated that the achievement of counter-terrorist measures must be undertaken in a manner consistent with international law and international human rights.

As noted in the introduction to this chapter, this part of the chapter is reasonably expository in nature. It seeks to determine what international directions there are on the question of human rights compliance, with some commentary on the nature and standing of those directions. Having done so,

⁴⁷ Unwin G, "The Need for Anti-Terrorism Legislation in Fiji", presentation at the public workshop, *How Should Fiji Respond to the Threat of Terrorism?*, hosted by the Citizens' Constitutional Forum and the Fiji Human Rights Commission, 17 July 2004, Suva, Fiji, para 4.

⁴⁸ Chapter Four, 4.2 Why Consider Human Rights in the Examination of Counter-Terrorist Legislation?

the chapter can then seek to measure those directions against New Zealand's human rights framework and its interface with counter-terrorist legislation.

5.2.1 Security Council

In general terms, Security Council resolutions concerning terrorism have confined their attention to the threat of terrorism to international peace and security. As already discussed, this reflects the role of the Council as the organ of the United Nations charged with the maintenance of peace and security.⁴⁹ Apart from one notable exception, the only inference that might be taken about counter-terrorism measures and their need to comply with human rights is from general statements within various resolutions that counter-terrorism is an aim that should be achieved in accordance with the Charter of the United Nations and international law.⁵⁰ It could be argued that this implies that such measures must themselves be compliant with the principles of the Charter and international human rights law.⁵¹ In that regard, Members of the United Nations have undertaken, under article 55(c) and through the preamble to the UN Charter, to universally observe human rights and

⁴⁹ Above at 5.2.1 *Security Council Resolutions*.

⁵⁰ See, for example, United Nations Security Council Resolutions 1373 of 28 September 2001, S/RES/1373 (2001), preambular para 5; 1438 of 14 October 2002, S/RES/1438 (2002), preambular para 2; 1440 of 24 October 2002, S/RES/1440 (2002), preambular para 2; 1450 of 13 December 2002, S/RES/1450 (2002), preambular para 4; 1455 of 17 January 2003, S/RES/1455 (2003), preambular para 3; 1456 of 20 January 2003, S/RES/1456 (2003), preambular para 8; 1535 of 26 March 2004, S/RES/1535 (2004), preambular para 4; 1540 of 28 April 2004, S/RES/1540 (2004), preambular para 14; and 1566 of 8 October 2004, S/RES/1566 (2004), preambular para 3.

⁵¹ This is the argument, for example, of Dunworth T, 'New Zealand's Legislative Responses to September 11', paper presented at the 10th Annual Meeting of the Australian and New Zealand Society of International Law, *New Challenges and New States: What Role for International Law?*, 16 June 2002, Australian National University, Canberra. See also Association for the Prevention of Torture, *APT Position Paper. Protection of the Human Rights and of Fundamental Freedoms in the Fight Against Terrorism*, URL <http://www.apr.ch/pub/library/pptter_en.htm> at 11 December 2003.

fundamental freedoms for all without distinction as to race, language or religion.

The Declaration of the Security Council meeting with Ministers of Foreign Affairs on 20 January 2003 - adopted under Resolution 1456 - does, in fact, specifically direct its attention to the question of compliance with human rights.⁵² Paragraph 6 of the Declaration provides:

6. States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law;

A further point to make is that, although not proactively seeking compliance with human rights standards, the Counter-Terrorism Committee of the Security Council has itself undertaken to remain conscious of the issue, the Chairman Sir Jeremy Greenstock stating:⁵³

The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums.

As was noted in Chapter Two, Security Council resolutions (when couched in mandatory rather than exhortatory language) are binding upon members of the United Nations.⁵⁴ What should be observed at this stage is that the Security Council has not made binding directions that counter-terrorism is to be

⁵² United Nations Security Council Resolution 1456 of 20 January 2003, S/RES/1456 (2003).

⁵³ See the Chairman's briefing to the Security Council in the record of speeches at the meeting of the Security Council, *Threats to International Peace and Security Posed by Terrorism*, 18 January 2002, S/PV.4453, 5.

⁵⁴ Chapter Two, 2.3.2(c) *Further obligations upon States?*

effected in compliance with human rights. All that can be said is that this is implicit within the broader framework of the United Nations Charter. Even the Declaration adopted under Resolution 1456 cannot be treated as binding, since the text of the Declaration (including paragraph 6 mentioned above) is preceded by the sentence “The Security Council therefore calls for the following steps to be taken” [emphasis added]. As concluded in Chapter Two, such an expression is not binding.⁵⁵ Paragraph 6 itself only provides that States “should adopt” counter-terrorist measures in accordance with human rights obligations.

Much more strongly phrased directions will be seen in the following discussion of General Assembly and Commission on Human Rights resolutions and other significant documents. As also discussed within Chapter Two, however, those resolutions are recommendatory only.⁵⁶ Albeit significant, the other documentation referred to (including jurisprudence of the European Court of Human Rights) is also what might be termed as ‘soft law’ for the purpose of examining New Zealand’s human rights framework. That is, the documentation represents guiding principles and non-binding resolutions and recommendations (‘soft law’), rather than binding resolutions, treaty provisions or customary law (‘hard law’). The author takes the view, however, that all resolutions and documents within this part of the chapter, having regard to their consistent approach, are highly influential.

⁵⁵ Ibid.

⁵⁶ Chapter Two, 2.3.1 *United Nations General Assembly*.

5.2.2 General Assembly

Both sets of resolutions by the General Assembly (those on measures to eliminate terrorism and those on terrorism and human rights) contain various statements about the need – when implementing such measures – to comply with international human rights. A standard phrasing of this was seen in Resolution 50/186 of 1995:⁵⁷

Mindful of the need to protect human rights of and guarantees for the individual in accordance with the relevant international human rights principles and instruments, particularly the right to life,

Reaffirming that all measures to counter terrorism must be in strict conformity with international human rights standards,

3. *Calls upon* States to take all necessary and effective measures in accordance with international standards of human rights to prevent, combat and eliminate all acts of terrorism wherever and by whomever committed;

A slightly less robust expression of these ideas was seen following the events of September 11, although still requiring measures to be taken consistently with human rights standards, as first seen in Resolution 56/88:⁵⁸

Stressing the need to strengthen further international cooperation among States and among international organizations and agencies, regional organizations and arrangements and the United Nations in order to prevent, combat and eliminate terrorism in all its forms and manifestations, wherever and by whomsoever committed, in accordance

⁵⁷ United Nations General Assembly Resolution 50/186 of 22 December 1995, A/RES/50/186, preambular paras 13 and 14, and operative para 3. See also United Nations General Assembly Resolutions 52/133 of 27 February 1998, A/RES/52/133, preambular paras 12 and 13, and operative para 4; 54/164 of 24 February 2000, A/RES/54/164, preambular paras 15 and 16, and operative para 4; 56/160 of 13 February 2002, A/RES/56/160, preambular paras 22 and 23, and operative paras 5 and 6; and 58/174 of 10 March 2004, A/RES/58/174, preambular paras 20 and 21, and operative para 7.

⁵⁸ United Nations General Assembly Resolution 56/88 of 24 January 2002, A/RES/56/88, preambular para 9 and operative para 3. See also similar statements within United Nations General Assembly Resolutions 57/27 of 15 January 2003, A/RES/57/27, preambular para 8 and operative para 6; 58/81 of 8 January 2004, A/RES/58/81, preambular para 9 and operative para 6; 58/136 of 26 January 2004, A/RES/58/136, preambular para 10 and operative para 5; and 59/46 of 16 December 2004, A/RES/59/46, preambular para 10 and operative para 3.

with the principles of the Charter, international law and relevant international conventions,

3. *Reiterates its call* upon all States to adopt further measures in accordance with the Charter of the United Nations and the relevant provisions of international law, including international standards of human rights, to prevent terrorism... [emphasis added]

This Resolution should not, however, be taken as a signal that the General Assembly was minded to turn a blind eye to adverse impacts of counter-terrorism upon human rights. In 2003 and 2004, the issue became the subject of two resolutions on that subject alone, both entitled “Protection of Human Rights and Fundamental Freedoms While Countering Terrorism”.⁵⁹ The first operative paragraphs of each resolution affirm:

...that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law;

5.2.3 Commission on Human Rights

Perhaps not surprisingly, the United Nations Commission on Human Rights has paid considerable attention to the issue of the adverse consequences that counter-terrorism might have upon the maintenance and promotion of human rights. It did so even before the flurry of anti-terrorist legislation that followed Security Council Resolution 1373 of 2001. In the pre-9/11 resolutions of the Commission and Sub-Commission already mentioned, the following was said about compliance with human rights:⁶⁰

Reiterating that all States have an obligation to promote and protect human rights and fundamental freedoms, and that everyone should strive to secure their universal and effective recognition and observance,

⁵⁹ United Nations General Assembly Resolutions 57/219 of 27 February 2003, A/RES/57/219 and 58/187 of 22 March 2004, A/RES/58/187.

⁶⁰ Commission on Human Rights Resolution 2001/37 of 23 April 2001, E/CN.4/RES/2001/37, preambular paras 18 and 19 and operative paras 7 and 8. Preambular para 19 was later reflected in Sub-Commission on Human Rights Resolution 2001/18 of 16 August 2001, E/CN.4/Sub.2/2001/18, preambular para 13.

Reaffirming that all measures to counter terrorism must be in strict conformity with international law, including international human rights standards,

7. *Calls upon* States, in particular within their respective national frameworks and in conformity with their international commitments in the field of human rights, to enhance their cooperation with a view to bringing terrorists to justice;

8. *Also calls upon* States to take appropriate measures, in conformity with the relevant provisions of national and international law, including international human rights standards, before granting refugee status, for the purpose of ensuring that an asylum-seeker has not participated in terrorist acts, including assassinations;

The report of the Commission's Special Rapporteur on the Promotion and Protection of Human Rights in June that year also addressed the matter. Although the mandate of the Special Rapporteur was to consider the impact of terrorism on human rights,⁶¹ she commented that a State's over-reaction to terrorism can also impact upon human rights. She pointed to the rights to freedom of speech, association, belief, religion and movement, and the rights of refugees as being particularly vulnerable to "undue suspension in the guise of anti-terrorist measures".⁶²

Post-September 11, particularly in recent months, resolutions of the Commission on Human Rights have been even more strongly worded. Two resolutions on the subject were adopted in 2004 alone. First, the issue was addressed within the Commission's annual resolution on human rights and terrorism.⁶³ In a resolution later that month, the Commission reaffirmed that

⁶¹ Consequent to the request of the General Assembly for the Commission to do so (see United Nations General Assembly Resolution 49/185 of 23 December 1994, A/RES/49/185, para 6) and through the Commission's own decision to consider the issue (see Commission on Human Rights Resolution 1994/46 of 4 March 1994, E/CN.4/RES/1994/46).

⁶² Koufa KK, above n 23, paras 109 and 110.

⁶³ Commission on Human Rights Resolution 2004/44 of 19 April 2004, E/CN.4/RES/2004/44, preambular para 24 and operative paras 10, 11 and 12:

States must comply with international human rights obligations when countering terrorism and called on States to raise awareness of the importance of doing so among their national authorities involved in countering terrorism.⁶⁴ This was coupled with the compilation, in September 2003, of a digest of jurisprudence on the protection of human rights while countering terrorism.⁶⁵ With the aim of assisting policy makers and other concerned parties to develop counter-terrorist strategies that respect human rights, the digest begins by saying:⁶⁶

No one doubts that States have legitimate and urgent reasons to take all due measures to eliminate terrorism. Acts and strategies of terrorism aim at the destruction of human rights, democracy, and the rule of law. They destabilise governments and undermine civil society. Governments therefore have not only the right, but also the duty, to protect their nationals and others against terrorist attacks and to bring the perpetrators

Stressing the growing consciousness of the international community of the negative effects of terrorism in all its forms and manifestations on the full enjoyment of human rights and fundamental freedoms and on the establishment of the rule of law and democratic freedoms as enshrined in the Charter of the United Nations and the International Covenants on Human Rights,

10. *Calls upon* States to take appropriate measures in conformity with the relevant provisions of national and international law, including international human rights standards, before granting refugee status, with the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts, and to ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

11. *Urges* States and the Office of the United Nations High Commissioner for Refugees to review, with full respect for legal safeguards, the validity of a refugee status decision in an individual case if credible and relevant evidence comes to light which indicates that the person in question has planned, facilitated or participated in the commission of terrorist acts;

12. *Invites* the Office of the United Nations High Commissioner for Human Rights to respond to requests from interested Governments for assistance and advice on ensuring full compliance with international human rights standards and obligations when undertaking measures to combat terrorism;

⁶⁴ Commission on Human Rights Resolution 2004/87 of 21 April 2004, E/CN.4/RES/2004/87, paras 1 and 2.

⁶⁵ United Nations Office of the High Commissioner for Human Rights, *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism*, September 2003, URL <<http://www.ohchr.org/english/about/publications/docs/digest.doc>> at 13 August 2004.

⁶⁶ *Ibid*, 3.

of such acts to justice. The manner in which counter-terrorism efforts are conducted, however, can have a far-reaching effect on overall respect for human rights.

The Digest considers decisions of United Nations treaty-monitoring bodies, such as the Human Rights Committee, and those of other regional bodies, including the European Court of Human Rights and courts within the inter-American system of human rights. It addresses general considerations, states of emergency and specific rights. Within the general considerations, two types of jurisprudence are relevant to this chapter. The first is that which emphasises the duty of States to protect those within their territories from terrorism.⁶⁷ The second, and of more relevance, is the identification of jurisprudence observing that the lawfulness of counter-terrorism measures depends upon their conformity with international human rights law.⁶⁸

In one of the latest reports of the Special Rapporteur, a preliminary draft of principles concerning terrorism and human rights was prepared.⁶⁹ The following parts of the draft are particularly pertinent to this chapter:⁷⁰

1. All international, regional and national action concerning terrorism should be guided by the United Nations Charter, all general principles of law, all norms of human rights as set out in international and regional treaties, and all norms of treaty-based and customary humanitarian law. Due attention should be paid to United Nations or regional treaty bodies, in particular any comments or commentary on specific treaty articles or issues.

8. All counter-terrorism measures should comply fully with all rules of international law, including human rights and humanitarian law, as interpreted by treaty bodies, experts of Charter-based bodies and other sources of international law.

⁶⁷ Ibid, 11-12. See, for example, *Delgado Paez v Colombia*, Human Rights Committee communication 195/1985, views adopted 12 July 1990, para 5.5.

⁶⁸ Ibid, 13-15.

⁶⁹ Koufa KK (as Special Rapporteur), *A Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, 11 August 2004, E/CN.4/Sub.2/2004/47.

⁷⁰ Ibid, Part II, paras 1, 8, 9 and 10.

9. Counter-terrorism measures should directly relate to terrorism and terrorist acts, not actions undertaken in armed conflict situations or acts that are ordinary crimes. Definitions of terrorist acts must be very carefully drawn so as to clearly set out the elements of terrorist crimes. Due attention should be paid to what is truly “terrifying.”

10. Any exceptions or derogations in human rights law must be in strict conformity with the rules set out in the applicable international or regional instruments. In particular, counterterrorism measures must not abrogate any existing norm of jus cogens, whether set out in applicable derogation clauses or not.

- (a) Given the sporadic occurrence of terrorist acts, great care should be taken to ensure that exceptions and derogations meet strict time limits and do not become perpetual features of national law.
- (b) Given that most acts of terrorism are carried out by small groups, great care should be taken to ensure that measures taken are necessary to apprehend actual members of terrorist groups or perpetrators of terrorist acts in a way that does not unduly encroach on the lives and liberties of ordinary persons.

Under its Decision 2004/109, the Sub-Commission on the Promotion and Protection of Human Rights resolved to establish a sessional working group with the mandate to elaborate detailed principles and guidelines, with commentary, concerning the protection of human rights when countering terrorism.⁷¹

Prior to that decision, and the Special Rapporteur’s report mentioned, the High Commissioner for Human Rights reported to the United Nations Conference on Human Rights.⁷² That report contained a detailed list of criteria for the balancing of human rights with counter-terrorism.⁷³

⁷¹ Sub-Commission on the Promotion and Protection of Human Rights Decision 2004/109 of 12 August 2004, E/CN.4/Sub.2/DEC/2004/109.

⁷² *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/81, 27 February 2002, E/CN.4/2002/18.

⁷³ *Ibid*, Annex. *Proposals for “further guidance” for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001). Compliance with international human rights standards*, I General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism.

Paragraphs 3 and 4 of the criteria are particularly relevant to the issue of achieving a balance between counter-terrorism and human rights and are considered further in the examination of the New Zealand Bill of Rights Act.⁷⁴

5.2.4 Other International Bodies

To complement the considerable body of resolutions adopted within the framework of the United Nations on the issue of compliance with human rights when countering terrorism, a number of other international organisations have undertaken studies on the subject and issued guidelines or other forms of recommendation. Brief consideration will be given to reports of three such bodies: the International Commission of Jurists; the Committee of Ministers to the Council of Europe; and the Advisory Council of Jurists to the Asia Pacific Forum of National Human Rights Institutions.

5.2.4(a) International Commission of Jurists. As part of its series of occasional papers, the International Commission of Jurists commissioned a

⁷⁴ Discussed below at 5.4 Counter-Terrorism and the NZBORA. Paragraphs 3 and 4 direct themselves to the question of limiting rights, providing:

3. Where this is permitted [the limitation of rights], the laws authorizing restrictions:
 - (a) Should use precise criteria;
 - (b) May not confer an unfettered discretion on those charged with their execution.
4. For limitations of rights to be lawful they must:
 - (a) Be prescribed by law;
 - (b) Be necessary for public safety and public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;
 - (c) Not impair the essence of the right;
 - (d) Be interpreted strictly in favour of the rights at issue;
 - (e) Be necessary in a democratic society;
 - (f) Conform to the principle of proportionality;
 - (g) Be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;
 - (h) Be compatible with the object and purposes of human rights treaties;
 - (i) Respect the principle of non-discrimination;
 - (j) Not be arbitrarily applied.

paper on terrorism and human rights.⁷⁵ The paper concluded with a list of basic criteria to be respected in the fight against terrorism.⁷⁶ The list identified certain minimum criteria that States must observe in the administration of justice when it comes to counter-terrorism:

- The primacy of the rule of law and of international human rights obligations.
- The need to strictly comply with international law when declaring a state of emergency and using emergency powers.
- Maintaining and guaranteeing at all times rights and freedoms that are non-derogable.⁷⁷
- Precise definitions of criminal offences.
- Ensuring that tribunals repressing terrorist acts are independent and impartial.
- Maintaining proper criminal process rights.⁷⁸

⁷⁵ Andreu-Guzmán, *Terrorism and Human Rights*, (International Commission of Jurists, 2002).

⁷⁶ Ibid, 248-251.

⁷⁷ Including, according to the paper, the prohibition against torture and ill-treatment; the prohibition of discrimination based on race, colour, sex, language, political opinion, religion or social origin; the prohibition of arbitrary deprivation of life; the prohibition of arbitrary deprivation of liberty; and the rights to an independent and impartial tribunal, the presumption of innocence and judicial guarantees: *ibid*, 248-249.

⁷⁸ Including, according to the paper, the right to be presumed innocent until proven guilty; to be informed, as soon as possible, of the charge(s) faced; to be represented by counsel of choice; to have the time and facilities required to prepare a defence; to be tried without undue delay; to be present at trial; to question prosecution witnesses and to call defence witnesses; not to be forced to incriminate oneself or admit guilt; to have the right of appeal to a higher court in the event of conviction; and respect for the principle of double-jeopardy: *ibid*, 249-250.

5.2.4(b) *Council of Europe*. In July 2002, the Committee of Ministers to the Council of Europe adopted guidelines on human rights and the fight against terrorism.⁷⁹ In the preface to the *Guidelines*, Secretary General Walter Schwimmer warned that although the suppression of terrorism is an important objective, States must not use indiscriminate measures to achieve that objective.⁸⁰

For a State to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law. It is precisely in situations on crisis, such as those brought about by terrorism, that respect for human rights is even more important, and that even greater vigilance is called for.

Drawing from the jurisprudence of the European Court of Human Rights, which has compulsory jurisdiction over States parties to the European Convention on Human Rights,⁸¹ and the ICCPR the *Guidelines* set out general guidelines on the interaction between counter-terrorism and human rights, as well as addressing specific rights and freedoms, with commentary on each stated guideline. Five of the *Guidelines* warrant mention within this chapter.

The first reflects the idea already considered in some detail, that counter-terrorism is an important objective in a free and democratic society. Article I talks of a positive obligation upon States to protect individuals within their territory from the scourges of terrorism. The *Guidelines* point to decisions of the European Court, in which it has recognised this duty and the particular

⁷⁹ Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, (Council of Europe Publishing, 2002).

⁸⁰ Ibid, 5.

⁸¹ Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953). The Court has compulsory jurisdiction under article 46 of the Convention.

problems associated with the prevention and suppression of terrorism.⁸² In *Klass and Others v Germany*, for example, the Court said:⁸³

The Court agrees with the [European] Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention.

The second and third articles are directly relevant to the question of compliance with human rights, and have relevance to the application of restrictions under both the ICCPR and New Zealand Bill of Rights Act 1990 (NZBORA):⁸⁴

II. Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III. Lawfulness of anti-terrorism measures

1. All measures taken by States to combat terrorism must be lawful.
2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

Further guidance on possible derogations is found in article XV, concerning derogations during situations of war or states of emergency threatening the life of a nation. Finally, article XVI underlines that States may never act in breach of peremptory norms of international law.

⁸² See, for example, *Ireland v the United Kingdom*, European Court of Human Rights, 18 January 1978, para 11; *Askoy v Turkey*, European Court of Human Rights, 18 December 1996, paras 70 and 84; *Zana v Turkey*, European Court of Human Rights, 25 November 1997, paras 59 and 60; *Incal v Turkey*, European Court of Human Rights, 9 June 1998, para 58; *United Communist Party of Turkey and Others v Turkey*, European Court of Human Rights, 20 November 1998, para 59; and *Brogan and Others v the United Kingdom*, European Court of Human Rights, 29 November 1999, para 48.

⁸³ *Klass and Others v Germany*, European Court of Human Rights, 6 September 1978, para 59.

⁸⁴ Discussed below at 5.4 The International Covenant on Civil and Political Rights, and 5.5 The New Zealand Bill of Rights Act 1990.

5.2.4(c) *Advisory Council of Jurists*. Closer to home, the Asia Pacific Forum of National Human Rights Institutions (a non-governmental organisation based in Sydney) referred to its Advisory Council of Jurists the question of the primacy of the rule of law in countering terrorism while protecting human rights.⁸⁵ The Executive Summary of the report is in very similar terms to those already seen in the reports of the International Commission of Jurists and Council of Europe.⁸⁶

The terms of reference adopted by the Forum and put to the Advisory Council are almost all very specific in nature, dealing with particular rights and freedoms. Term of reference IX, however, asks what international rights standards may be derogated from when countering terrorism and in what circumstances. The Council, including New Zealand's own Justice Glazebrook, answered by setting out three principles. It firstly reiterated that torture, inhuman and degrading treatment and punishment can in no circumstances be justified,⁸⁷ reflecting the non-derogable nature of that prohibition.⁸⁸ Secondly, it confirmed that certain human rights have become norms of customary international law and that such norms must also be complied with at all times by all States.⁸⁹ Finally, it addressed the issue of

⁸⁵ Advisory Council of Jurists, *Reference on the Rule of Law in Combating Terrorism. Final Report*, (The Asia Pacific Forum of National Human Rights Institutions, 2004.).

⁸⁶ Ibid, 10-12.

⁸⁷ Ibid, 62-63.

⁸⁸ As reflected, in turn, within the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987 and ratified by New Zealand in 1989), article 2(2).

⁸⁹ This includes, said the Advisory Council, minimum due process rights such as the presumption of innocence, the principles of non-discrimination and the right not to be subject to arbitrary detention: above n 84, 63-64.

states of emergency under the ICCPR, which is to be discussed later in this chapter.

The report of the Advisory Council of Jurists then makes observations and recommendations concerning Forum States. Some of New Zealand's counter-terrorist legislation is commented upon within this part of the report. The Council's comments and recommendations will be considered in more detail within Chapters Seven, Eight and Nine.⁹⁰

5.2.5 Summary

Earlier within this part of the chapter, two questions were raised: are the two objectives of countering terrorism and protecting human rights compatible; and, more fundamentally, is compliance with human rights necessary when pursuing an objective as important as counter-terrorism? Against the background of the resolutions, guidelines and recommendations just discussed, it seems clear that the answer is that the two objectives are compatible, so long as counter-terrorism is implemented in a manner that complies with human rights.

The latter conclusion may seem absolute in its terms, but it is not. In saying that measures taken to combat terrorism must comply with human rights standards, it must be remembered that human rights standards themselves allow for limitations. This is a matter that has been discussed in general terms within Chapter Four.⁹¹ As stated by Andrew Butler in his examination of section 5 of the New Zealand Bill of Rights Act, "limits are

⁹⁰ Those chapters examine particular rights and freedoms against various provisions of New Zealand's counter-terrorist legislation.

⁹¹ Chapter Four, 4.4.2 *Limiting Rights under the Bill of Rights Act and Human Rights Act*.

fundamental too”.⁹² In the *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism*, the introduction itself recognised that:⁹³

Human rights law establishes a framework in which terrorism can be effectively countered without infringing on fundamental freedoms.

Within the context of New Zealand’s international and domestic human rights obligations and framework, the issue to be next addressed is how those limiting provisions might accommodate counter-terrorism.

5.3 Counter-Terrorism and the ICCPR

Two important questions arise in placing the application of the ICCPR within the context of counter-terrorism. Firstly, can terrorism give rise to a state of ‘public emergency’ within the meaning of the ICCPR? Secondly, are the ‘non-derogable’ rights identified within the Covenant truly non-derogable when countering terrorism?

5.3.1 Terrorism and Emergency Measures

The question to consider here is whether article 4(1) would serve as an appropriate mechanism (at least for the purpose of the Covenant) by which counter-terrorist measures infringing human rights could be justified. The provision has indeed been relied upon to do so. In December 1998, the Secretary of State for the United Kingdom, Geoffrey Howe, lodged a notice advising that the Government found it necessary to take measures derogating from certain obligations under article 9 of the ICCPR by reason of a public

⁹² Butler A, “Limiting Rights”, (2002) 33 *Victoria University of Wellington Law Review* 537, 556.

⁹³ Above n 65, 3.

emergency caused by terrorism.⁹⁴ Needless to say, this was and continues to be a controversial matter.⁹⁵

Notably, New Zealand has not lodged, and does not appear to intend to lodge, a notice of derogation(s) under article 4 of the International Covenant. For that reason, consideration of article 4 in the context of counter-terrorism will be brief. Some general observations and thoughts are nevertheless expressed.⁹⁶

Due to the provisos attached to the operation of article 4(1), one might argue that counter-terrorist measures could only in very limited circumstances be said to be within the context of a state of emergency which threatens the life of a nation: namely, that such a state of emergency only exists during the period of a terrorist attack itself. To counter this, one might posit that the threat of acts of terrorism itself activates a state of emergency. Certainly, this finds some support in the language of Security Council Resolution 1373, which described “any act of international terrorism” [emphasis added] as constituting a threat to international peace and security.⁹⁷

⁹⁴ Foreign and Commonwealth Office, United Kingdom, *Derogations from ICCPR*, 23 December 1998, URL <<http://www.law.qub.ac.uk/humanrts/ehris/ni/derog/derogiccpr.htm>> at 11 December 2003. As set out at para 2 of the notice of derogation:

There have been in the United Kingdom in recent years campaigns of organised terrorism connected with the affairs of Northern Ireland which have manifested themselves in activities which have included repeated murder, attempted murder, maiming, intimidation and violent civil disturbance and in bombing and fire raising which have resulted in death, injury and widespread destruction of property. As a result, a public emergency within the meaning of Article 4(1) of the Covenant exists in the United Kingdom

⁹⁵ See, for example, Justice [a non-governmental law reform and human rights organisation], *Response to the Joint Committee on Human Rights Inquiry into UK Derogations from Convention Rights*, (Justice, 2002).

⁹⁶ A very worthwhile text on the subject of states of emergency and permissible human rights derogations is that by Oraa J, *Human Rights in States of Emergency in International Law*, (Clarendon Press, 1992).

⁹⁷ United Nations Security Council Resolution 1373 of 28 September 2001, S/RES/1373 (2001), as discussed at 5.1.1 *Security Council Resolutions*.

While the latter argument might hold some attraction, it is flawed in the writer's view for several reasons. Firstly, counter-terrorist measures include surveillance, investigation and prosecution: events prior to and after terrorist conduct and therefore outside what might be considered to be any state of emergency. Next, some such measures are not temporary in nature – surveillance being the prime example (an activity designed to gain information about terrorist threats prior to their being effected and thereby prevent them), although it has to be said that surveillance can be implemented by way of a temporary measure. Finally, as noted by the Human Rights Committee in its General Comment on article 4:

[I]n times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made.

For the foregoing reasons, the conclusion may be drawn that article 4(1) of the ICCPR does not, itself, permit counter-terrorist measures to limit rights and freedoms except in the very narrow situation of terrorist conduct creating a state of emergency threatening the life of the nation and, even then, only by way of temporary means and so long as the non-derogable rights set out in article 4(2) are left intact. If one applies the permissible limitations within the terms described by the Human Rights Committee, this would only be available as long as a state of emergency exists. Counter-terrorism, by definition, involves the idea of *preventing* terrorist activities *before* they create a state of public emergency and could not (in that broader context) validate emergency measures during a “public emergency” within the meaning of article 4.

This conclusion appears to be the same as that reached by the Council of Europe Committee of Ministers in its *Guidelines* on human rights and counter-terrorism.⁹⁸ Article XV(1) of the *Guidelines* provides:

When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments. [emphasis added]

5.3.2 The Fiction of Non-Derogable Rights

Indicated within Chapter Four, in discussing article 4 of the ICCPR, was the author's doubt about the notion that some rights are absolute and non-derogable.⁹⁹ That notion, having regard to what has been discussed earlier within this chapter, is clearly a view also held by the International Commission of Jurists¹⁰⁰ and the Advisory Council of Jurists.¹⁰¹ Interestingly, though, the draft guidelines of the High Commissioner for Human Rights do not expressly prohibit the limitation of purportedly 'non-derogable' rights.¹⁰²

The issue being explored here is whether rights are absolute and non-derogable. Is this a fair reflection of what is lawful and/or 'acceptable' at international law? To provide some context to this question, consider the following fictional example:

An armed terrorist group from the Balkans has hijacked an Air New Zealand aircraft, just prior to its landing at Wellington. It demands the New Zealand Government to release General X from its custody (X

⁹⁸ Above n 79.

⁹⁹ Chapter Four, 4.4.1(a) *Non-derogable rights*.

¹⁰⁰ Above n 75, 248-249.

¹⁰¹ Above n 85, 62-63.

¹⁰² Paragraphs 3 and 4 of the High Commissioner's guidelines, above n 73, set out prescriptions and proscriptions for the limitation of rights when countering terrorism.

having been convicted of genocide by the International Criminal Court and serving his sentence of imprisonment in New Zealand under the provisions of the International Crimes and International Criminal Court Act 2000). The group demands that the General be released to their custody by no later than 10pm that day, failing which it will execute one passenger every hour until the General is released.

As part of standard counter-terrorist operations, the SAS is called on to act as an aid to the civil power. Not wanting to release the General and fearing that the threats of the terrorist group are real, the SAS unit is ordered to seize and secure the aircraft prior to 10pm. In the course of the operation, S [one of the SAS soldiers] shoots and kills T [one of the terrorists], who was armed at the time and had moved his rifle towards one of the hostages.

The New Zealand police investigate the circumstances of the killing and conclude that S had acted in defence of the hostage, believing that T was about to shoot the hostage. Relying on section 48 of the Crimes Act 1961, the investigating officer concludes that a homicide charge against S is not appropriate. Section 48 provides that “every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use”.

Such a situation is not unforeseeable and it involves the taking of a life. The question is whether New Zealand would be in breach of the ICCPR through the action of S (its military agent). If one was to adopt the approach that the right to life is non-derogable, even in times of emergency, then the answer would be in the affirmative. The author posits, however, that the right to life is not entirely non-derogable, and that great care should be taken when trying to advance an argument that a right is non-derogable. Taking the fictional example further:

T’s family learn of his death and, on the basis that T was in New Zealand territory at the time of his being killed, bring a claim against New Zealand before the Human Rights Committee, under the First Optional Protocol to the ICCPR.

How would the Human Rights Committee find in the matter? Assuming that the communication is admissible within the terms of the Optional Protocol,¹⁰³ the Committee would consider article 6 of the Covenant, through which the right to life is guaranteed. There are two points to note about article 6. Firstly, it recognises that the right to life is not treated as a universal right by all States, some States having retained the death penalty.¹⁰⁴ Secondly, the enunciation of the right to life within article 6(1) of the Covenant is in qualified terms:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life. [emphasis added]

The question before the Committee, then, would be whether T had been *arbitrarily* deprived of life. While the Human Rights Committee has not attempted to define the term ‘arbitrarily’, apparently preferring to treat each case on the facts, it has issued a general comment of relevance to the scenario posed:¹⁰⁵

The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6(1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.

¹⁰³ For a discussion on the admissibility of communications before the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights, see Conte A, Davidson S and Burchill R, *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee* (Ashgate Publishing Ltd, 2004), 17-29.

¹⁰⁴ See paragraphs 2 to 6 of article 6. See also the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

¹⁰⁵ United Nations Human Rights Committee, General Comment No 6, *Article 6*, HRI/GEN/1/Rev.1 at 6 (1994), para 3.

Notwithstanding this position, it is posited that the factual scenario being considered would lead the Human Rights Committee to conclude that the taking of T's life by S was not, in the particular circumstances, arbitrary. In *Burrell v Jamaica*, the Committee had to consider the shooting of Mr Burrell, following the hostage-taking of some warders at St Catherine's Prison.¹⁰⁶ Because Mr Burrell was shot and killed after the warders had been released and rescued, the Committee found that the need to use force no longer existed at the time of his shooting and that Jamaica was therefore responsible for a violation of article 6(1) of the Covenant.¹⁰⁷ The situation at hand, however, does not involve the same element of arbitrariness. The conduct of S was based upon S' belief that T was about to take the hostage's life and, acting in defence of the hostage, he shot T. That does not, it is suggested, amount to an arbitrary taking of life, but instead to a measured and proportional response in the circumstances. If the Committee agreed with such a conclusion, then this would not support the notion that the right to life is an absolute, non-derogable one.

Taking an alternative approach, consider these additional facts:

Rather than bringing a claim directly against New Zealand, T's family persuade the Government of Greece (T being a Greek national) to bring a claim against New Zealand. Greece claims that reparations are due to it as a result of the killing of one of its nationals by an agent of the New Zealand State and under the international law rules of 'State Responsibility'.

How would the International Court of Justice find in the matter? The starting point is to consider the Articles on State Responsibility, which have been developed over a number of years by the International Law Commission as

¹⁰⁶ *Burrell v Jamaica*, Human Rights Committee Communication 546/1993.

¹⁰⁷ *Ibid*, para 9.5.

partly codifying and partly developing the rules concerning the responsibility of States to one another.¹⁰⁸ The overall idea of State Responsibility is that, where a State commits an ‘internationally wrongful act’, it is responsible to make good for that act (by reparation or other means), unless the conduct is otherwise defensible. Article 2 provides:

There is an internationally wrongful act of a State when conduct consisting of an act or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

The constant jurisprudence of international tribunals makes it clear that the conduct of S, as a member of the SAS, would be attributable to New Zealand under international law.¹⁰⁹ Greece would then argue that the taking of T’s life constituted a breach of New Zealand’s obligation not to take the life of any person within its territory. Assuming that it was successful in doing so, which is doubtful (in the author’s view),¹¹⁰ New Zealand would find itself in a position of having committed, *prima facie*, an internationally wrongful act. The question would then be whether New Zealand could otherwise defend the conduct of its SAS agent. In that regard, Chapter V of the Articles on State

¹⁰⁸ The Articles on State Responsibility were adopted by the United Nations General Assembly under its Resolution 56/83 of 12 December 2001, A/RES/56/83 (Annex).

¹⁰⁹ See article 4 of the Articles on State Responsibility, together with the commentary of the International Law Commission, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10), November 2001, 84-92.

¹¹⁰ Consider the earlier discussion concerning the arbitrary taking of life versus the taking of life in the defence of another.

Responsibility sets out ‘circumstances precluding wrongfulness’. Article 24 is of particular relevance:

Article 24, Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.
2. Paragraph 1 does not apply if:
 - (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The act in question is likely to create a comparable or greater peril.

It is the view of the author that New Zealand could successfully argue that the conduct of S was in a situation of distress, leaving S with no other reasonable way of saving the life of the hostage.

It appears to the author that the situation is also analogous to the international law principle of anticipatory self-defence. Although there is some debate about whether this customary law principle has survived the advent of the United Nations Charter, it is a principle upon which States agreed at the time that the Charter was adopted.¹¹¹ The principle goes to illustrate that States have considered that the use of force (even on an international, State-to-State level) can be permissible in limited circumstances. Heralded as the ‘case’ through which the principle was established,¹¹² the *Caroline Case* established that force may be used if a State is able to show a “necessity of self-defence, instant, overwhelming, leaving no

¹¹¹ On the question of whether anticipatory self-defence remains extant, see, for example, Brownlie I, *Principles of Public International Law* (6th ed, Oxford University Press, 2003), 701-702, and Harris DJ, *Cases and Materials on International Law* (5th ed, Sweet & Maxwell, 1998), 896-898.

¹¹² The *Carline Case* is not exactly a case, since there was no litigation or arbitration that was ruled upon. Rather, it is a situation that existed and in respect of which correspondence was exchanged between the governments of the United Kingdom and United States: see Jennings RY, “The Caroline and McLeod Cases”, (1938) 32 *American Journal of International Law* 82.

choice of means, and no moment for deliberation".¹¹³ That description again fits with the factual scenario being considered.

What is to be taken from this discussion and analysis? Although somewhat theoretical, the latter discussion illustrates a number of important points. Firstly, it is a fictional notion to describe rights as universal and non-derogable. If the most fundamental of human rights, the right to life, is one that can be limited (albeit in very limited circumstances), then great care should be taken in advocating that *any* right is non-derogable.¹¹⁴ The most that can be said, it is posited, is that each legislative measure must be examined against the particular right(s) it might affect, and that any limitation upon rights must not be arbitrary, requiring it to be both necessary and proportionate.

5.4 Counter-Terrorism and the NZBORA

Discussed in the preceding chapter was the manner in which sections 4, 5 and 6 of the New Zealand Bill of Rights Act are to apply in the examination of any provision of an enactment. It is not necessary to repeat that examination for the purpose of this chapter. The sole issue of concern here is this: how

¹¹³ Jennings, *ibid*, 89.

¹¹⁴ Although it is arguable that the prohibition against torture, identified by the International Law Commission as a norm of *jus cogens*, is an absolute prohibition from which no derogation is ever permitted: see the commentary of the Commission Special Rapporteur, Sir Hersch Lauterpacht, concerning article 53 of the draft Vienna Convention on the Law of Treaties: Lauterpacht H, *Report of the Special Rapporteur on the Law of Treaties*, International Law Commission Report, A/2456 (A/8/9), 1953, chapter V(II)(i). For a further discussion on the peremptory nature of the prohibition against torture, see also Evans MD, *Preventing Torture. A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment* (Clarendon Press, 1998), and Conte, Davidson and Burchill, above n 103, 93-99. Since there is nothing in New Zealand's counter-terrorist framework purporting to limit this prohibition, however, this issue is not taken any further.

would section 5 of the NZBORA be applied in the examination of any statutory counter-terrorism provision?

5.4.1 Preliminary Matters in the Application of Section 5

Remembering the preliminary points made in Chapter Four about the application of section 5,¹¹⁵ and applying these to the examination of counter-terrorist provisions, a number of points can be made at the outset. Firstly, the onus of justifying limitations upon any rights or freedoms set out in the NZBORA (through any statutory counter-terrorist provisions) rests with the State.¹¹⁶ The Crown must satisfy a court, on the balance of probabilities, that the limitation is a reasonable limit, prescribed by law, and demonstrably justified in a free and democratic society.

Next, any limitation sought to be justified under section 5 must be a ‘limitation’ of a right or freedom, rather than an exclusion of it. This approach is consistent with the paragraph 4 of the criteria for the balancing of human rights with counter-terrorism, as proposed by the United Nations High Commissioner for Human Rights.¹¹⁷ Paragraph 4(a) of the criteria advocates that limitations of rights, to be lawful, must not impair the “essence” of the right.

¹¹⁵ See Chapter Four, 4.4.2(b) *Onus and standard of proof*, 4.4.2(c) *Reasonable “limitation”* and 4.4.2(d) *The limitation must be “prescribed by law”*.

¹¹⁶ Chapter Four, 4.4.2(b) *Onus and standard of proof*.

¹¹⁷ Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/81, 27 February 2002, E/CN.4/2001/8, Annex - *Proposals for “further guidance” for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001). Compliance with international human rights standards*, I General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism.

Finally, and stemming from the words of section 5 and relevant case law interpreting those words, a limitation must be “prescribed by law” - requiring the limit to be (1) adequately accessible; (2) formulated with sufficient precision; and (3) such that it does not confer an unfettered discretion.¹¹⁸ Adequate accessibility has been held to be satisfied in the case of Acts of Parliament and Regulations (which is the form of the counter-terrorist provisions being examined within this thesis).¹¹⁹ Sufficiently precise formulation and the absence of an unfettered discretion are matters that will need to be examined on a case-by-case basis. Again, these three features (accessibility, precision, and no unfettered discretion) are consistent with the criteria advocated by the High Commissioner for Human Rights. In particular, paragraph 4(a) of the criteria provides that, for limitations of rights to be lawful, they must be prescribed by law - with paragraph 3 specifying that any law authorising restrictions upon human rights:

- (a) Should use precise criteria;
- (b) May not confer an unfettered discretion on those charged with their execution.

They are also compatible with article II of the Council of Europe’s *Guidelines on Human Rights and the Fight Against Terrorism*, prohibiting arbitrariness and stating that:

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

¹¹⁸ See *Sunday Times v United Kingdom* (1978) 58 ILR 491, 524-527, and *Ontario Film and Video Appreciation Society* [1984] 45 OR (2d) 80 - discussed in Chapter Four at 4.4.2(d) *The limitation must be “prescribed by law”*.

¹¹⁹ See *R v Thomsen* (1988) 63 CR (3d) 1, and *R v Therens* [1985] 1 SCR 613 - discussed in Chapter Four at 4.4.2(d) *The limitation must be “prescribed by law”*.

Article III(2) adds that “When a measure restricts human rights, restrictions must be defined as precisely as possible”.

Once these preliminary matters are attended to, application of the substantive test under section 5 of the NZBORA can proceed.

5.4.2 Application of the Substantive Test under Section 5

The substance of section 5 is that it permits reasonable limits to be imposed upon human rights, where such limits can be demonstrably justified in a free and democratic society.¹²⁰ This requires that the limitation is in pursuit of a pressing and substantial objective and that it is implemented by proportional means. The question, then, is this: can statutory counter-terrorist measures (if they are in accord with the preliminary matters just mentioned) satisfy the substantive requirement of reasonableness in a free and democratic society? From this enquiry come two questions:¹²¹ firstly, is counter-terrorism a pressing and substantial objective; and, secondly, is the particular limitation imposed by the statutory provision proportionate to that objective?

The first question appears to be easily answered in the affirmative. It is quite obvious that counter-terrorism is a pressing and substantial objective in a free and democratic society. Taking into account the statements of the Security Council, General Assembly and Commission on Human Rights, terrorism is clearly viewed as something that has a significant and adverse impact upon democracy, human rights, and the maintenance of both territorial

¹²⁰ Chapter Four, 4.4.2 *Limiting Rights under the Bill of Rights Act and Human Rights Act.*

¹²¹ See the discussion on the substantive test under section five: Chapter Four at 4.4.2(e) *The substantive test under section 5.*

and international security.¹²² Indeed, the Security Council and General Assembly have said that it is an objective “essential” to the maintenance of international peace and security.¹²³

Despite this conclusion, the criteria of the High Commissioner for Human Rights clearly seek to require States to give consideration to the necessity of limiting measures in each case. Paragraph 4 instructs that limits must:

- (b) Be necessary for public safety and public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;
- (e) Be necessary in a democratic society;

Perhaps the question of establishing a pressing and substantial objective requires more thought? Is it sufficient to say that ‘counter-terrorism’ qualifies as such an objective, or must this first element be applied to the consideration of each particular statutory measure? Should, for example, there be an assessment of the importance of the objective of countering the financing of terrorism, or the protection of nuclear material, or the suppression of terrorist bombings, etc, or is that level of assessment something that falls within the second (proportionality) limb of the section 5 limitations test? The author posits that a combined approach is called for. In saying so, the following observations should be made:

- When assessing whether any particular counter-terrorist provision is pressing and substantial in a free and democratic society, regard should be had to the contribution that provision makes to the overall international

¹²² Discussed above at 5.1.3 *An Overview of United Nations Observations*.

¹²³ United Nations Security Council Resolutions 1189 of 13 August 1998, S/RES/1189 (1998), preambular para 3; and 1269 of 19 October 1999, S/RES/1269 (1999), preambular para 8. See also United Nations General Assembly Resolutions 27/3034 to 44/29, as listed above n 17, preambular para 8.

and domestic legal framework in countering terrorism. Having regard to the significant importance of the latter framework, it will normally be concluded, it is posited, that the provision satisfies the first limb of section 5. It is notable, in that regard, that most cases before the Supreme Court of Canada have satisfied this first branch of the *R v Oakes* test.¹²⁴

- As a responsible international actor, whose domestic national interests rely upon the maintenance of a peaceful, secure, and free-functioning international society, New Zealand's implementation of its international counter-terrorist obligations is important not only to its compliance with those obligations but also to the promotion of its own interests. New Zealand's Chief Ombudsman in 1976 referred to the growing importance of terrorism in the world and "the desirability in the national interest of [New Zealand] being well informed and well prepared in this regard" [emphasis added].¹²⁵
 - Regard will also need to be had to any direct threat to the democratic State in question. In that regard, Chapter Two has discussed the history of terrorist acts in the South Pacific and the risk of terrorism in the region.¹²⁶
- To give rise to a pressing objective to eliminate direct terrorist threats, any such threat should not, it is posited, be completely hypothetical.

¹²⁴ Jamal M, Taylor M and Stratas D, *The Charter of Rights in Litigation. Direction from the Supreme Court of Canada* (Ontario, Loose Leaf, 1990-), July 2004 update, 6-6.3. Having made that point, the text continues by warning that "the characterization of the objective is all-important. If the true objective of the impugned provision is administrative convenience or the saving of costs, the Court is likely to hold that the objective is not sufficiently pressing and substantial to warrant overriding a guaranteed right or freedom".

¹²⁵ Powels G, *Security Intelligence Service: Report by Chief Ombudsman*, AJHR 1976 A 3A, 31.

¹²⁶ See Chapter Three at 2.4.1 *Terrorist Threats in the South Pacific* and 2.4.3 *The Risk of Terrorism in the South Pacific*.

- The particular importance of the provision (that is, of its objective) will be critical to the assessment of whether the limitation(s) it imposes upon human rights is/are proportional (in satisfaction of the second limb of section 5).

5.4.3 Proportionality

The second limb of the test requires the particular means by which the objective is implemented to be proportional to the objective (the idea, as stated by the Secretary-General of the Pacific Islands Forum when speaking on counter-terrorism, that “the cure should never be worse than the disease”).¹²⁷ In considering this requirement of proportionality, this part of the chapter seeks to address two things. Firstly, to consider how the section 5 proportionality test fits with the various recommendations and guidelines on counter-terrorism and human rights. Secondly, to establish some principles on how to *measure* proportionality when considering counter-terrorist legislation.

5.4.3(a) Does the section 5 proportionality test fit with external guidelines on counter-terrorism and human rights? As set out in the *Radio New Zealand* case, there are three components in determining whether the means chosen by

¹²⁷ Unwin G, “The Need for Anti-Terrorism Legislation in Fiji”, presentation at the public workshop, *How Should Fiji Respond to the Threat of Terrorism?*, hosted by the Citizens’ Constitutional Forum and the Fiji Human Rights Commission, 17 July 2004, Suva, Fiji, para 4.

the law to achieve an objective are proportional and appropriate to the objective.¹²⁸

1. The limiting measures or the law must be designed to achieve the objective not being arbitrary, unfair or based on irrational considerations. In other words, the means must be rationally connected to the objective.
2. The measures or the law should impair as little as possible the right or freedom.
3. There must be a proportionality between the effects of the measures or the law responsible for limiting the right or freedom and the objective – i.e., the law which restricts the right must not be so severe or so broad in application as to outweigh the objective.

This requirement for proportionality not only forms part of New Zealand's jurisprudence, but also sits squarely with the recommendations of the Sub-Commission for Human Rights Special Rapporteur, the High Commissioner for Human Rights and the Committee of Ministers to the Council of Europe. The Special Rapporteur's preliminary draft principles concerning terrorism and human rights provides at paragraph 10(b) that:¹²⁹

Given that most acts of terrorism are carried out by small groups, great care should be taken to ensure that measures taken are necessary to apprehend actual members of terrorist groups or perpetrators of terrorist acts in a way that does not unduly encroach on the lives and liberties of ordinary persons.

Articles III(2) of the Council of Europe's *Guidelines on Human Rights and the Fight Against Terrorism* is equally relevant, directing that when a counter-terrorist measure restricts human rights it must be "necessary and proportionate to the aim pursued". The High Commissioner's guidelines are

¹²⁸ *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48, 60-61.

¹²⁹ Above n 23.

also relevant, calling for necessity and proportionality. In that regard, paragraph 4 provides (in part) that limitations must, to be lawful:

4. For limitations of rights to be lawful they must:
 - (b) Be necessary for public safety and public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;
 - (e) Be necessary in a democratic society;
 - (f) Conform to the principle of proportionality;
 - (g) Be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function; [emphasis added]

It is thus concluded that the proportionality limb of the section 5 limitations test (as expounded in the *Radio NZ* and *Oakes* cases) is consistent with international guidelines that have specifically directed themselves to the issue of counter-terrorism and human rights. The significance of this comes into play later in this chapter, when consideration is given to the possibility of finding counter-terrorist objectives justified under section 5 of the NZBORA but not under the ICCPR.¹³⁰ Having arrived at that conclusion, it is then necessary to consider each of the three factors identified within of the proportionality test.

5.4.3(b) Factor 1: Measures rationally connected to the achievement of the objective. Require a limiting measure to be rationally connected to the achievement of the objective is the first of the threefold proportionality test first set out by the Supreme Court of Canada in *R v Oakes*. The Supreme Court Directions on the Charter of Rights notes that the Court has seldom found that legislation fails this part of the test, although there are instances

¹³⁰ Discussed below at 5.5.2(b) *The 'exceptional course' of rendering a conflict otherwise acceptable.*

where this has occurred.¹³¹ In *R v Oakes* itself, for example, section 8 of the Narcotic Control Act 1970 was found to lack rational connection. Section 8 (which had certain criminal process implications and thereby impacted upon criminal process rights) contained a statutory presumption that possession of even small amounts of narcotics meant that the offender was deemed to be trafficking in narcotics. There was no rational connection, said the Court, between the possession of small amounts of narcotics and the countering of trafficking.¹³²

In the application of the rational connection factor of the proportionality test, as part of the overall justified limitations test, one might logically conclude that this will require satisfaction on the balance of probabilities.¹³³ The approach of the Supreme Court of Canada, however, has been much more flexible in this area. In the course of finding that the rational connection test was satisfied in *Lavigne v Ontario Public Service Employees Union*, the Court formulated the following test to determine whether a rational connection exists:¹³⁴

The *Oakes* inquiry into “rational connection” between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means the government has chosen to adopt.

Applying this to any examination of statutory counter-terrorist measures, and having already concluded that counter-terrorism is a legitimate and important goal, the statutory provision must be shown to ‘logically further’ counter-

¹³¹ Above n 124, 6:06.

¹³² *R v Oakes* (1986) 26 DLR (4th) 200.

¹³³ Chapter Four, 4.4.2(b) *Onus and standard of proof*.

¹³⁴ *Lavigne v Ontario Public Service Employees Union* [1991] SCR 211, 219 (Wilson J).

terrorism. It is suggested that this should not be difficult to establish so long as the statutory provision is somehow linked to the pursuit of the international counter-terrorism regime or to particular threats faced by New Zealand.

Having said that a reasonably low threshold is applied for this part of the proportionality test, the Supreme Court has taken a more robust approach where the connection between objective and means is not plainly evident. In the recent case of *Figueroa v Canada (Attorney General)*, for example, the Court was critical of aspects of the Canada Elections Act 1985 concerning the registration of political parties and the tax benefits that flow from such registration.¹³⁵ In particular, the Act required that a political party nominate candidates in at least 50 electoral districts to qualify for registration. While the Court held that it was a pressing objective to ensure that the tax credit scheme was cost-efficient, it found that there was no rational connection between that objective and the 50-candidate threshold requirement. Iacobucci J for the majority was particularly critical of the fact that the government had provided no evidence that the threshold actually improved the cost-efficiency of the tax credit scheme.

5.4.3(c) Factor 2: Minimal impairment of the right. As for the first part of the proportionality test, this has also been applied in a reasonably flexible manner by the Supreme Court. The first expression of this factor by the Court in *R v Oakes* required that the law “must impair the right or freedom as little as possible”. Since *Oakes*, however, the Supreme Court has tended towards the requirement that an impairment of rights should be as little as reasonably possible. It is suggested that the same approach would be taken in New

¹³⁵ *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912.

Zealand, having regard to the expression in *Radio NZ* that the law “should” impair rights as little as possible, rather than the more compelling expression in *Oakes* that this “must” occur.

In justifying the more flexible approach in Canada, La Forest J, in *R v Edwards Books and Art Ltd*, spoke of the need to give the legislature some room to manoeuvre in choosing the appropriate means to implement its legislative objective.¹³⁶ In a decision three years later, the Chief Justice commented as follows in *Irwin Toy v Quebec (Attorney General)*:¹³⁷

Parliament may not have chosen the absolutely least intrusive means of meeting its objective, but it has chosen from a range of means which impair [the right] as little as is reasonably possible. Within this range of means it is virtually impossible to know, let alone be sure, which means violate Charter rights the least.

La Forest CJ later warned, however, that deference to the legislature was not unrestricted and that the Crown must show that there was a reasonable basis for concluding that the law achieved a minimal impairment.¹³⁸ What can be said thus far, then, is that a limiting provision should impair rights as little as reasonably possible. In determining whether that has occurred, a degree of deference is likely to be paid by the judiciary - so long as it can be shown that Parliament made a reasonable choice in determining the means by which the objective is to be achieved.

In considering the question of choice, the Supreme Court has shown some reluctance to examine the availability of alternative measures. In *R v Schwartz*, for example, it was suggested that the statutory provision (which provided for a presumption that a person did not have a firearms licence if

¹³⁶ *R v Edwards Books and Art Ltd* [1986] 2 SCR 713.

¹³⁷ *Irwin Toy Quebec (Attorney General)* [1989] 1 SCR 927, 1343.

¹³⁸ *McKinney v University of Guelph* [1990] 3 SCR 229, 286.

s/he failed to produce one upon request) unnecessarily infringed the presumption of innocence. Counsel for Schwartz argued that police could simply check their computerised records to ascertain whether a licence had indeed been obtained. McIntyre J stated:¹³⁹

Even if there is merit in the suggestion... Parliament has made a reasonable choice in the matter and, in my view, it is not for the Court, in circumstances where the impugned provision clearly involves, at most, minimal - or even trivial - interference with the right guaranteed in the Charter, to postulate some alternative which in its view would offer a better solution to the problem...

The particular wording of that statement suggests, however, that the judiciary should only be disinclined to examine alternatives where the impugned provision involves a minimal, or trivial, impairment of rights. That was the approach taken in *Figueroa*, the Court concluding that the minimal impairment test had not been satisfied since cost savings could be achieved without violating the Charter.¹⁴⁰

Applying the minimal impairment test to New Zealand's counter-terrorist legislation, statutory provisions will need to show that they impair rights as little as reasonably possible. In determining whether that has occurred, a degree of deference will be paid to allow for Parliamentary discretion in determining what means to implement, but the courts are likely to examine the availability of alternative measures in instances where the human rights interference is more than minimal, or trivial.

5.4.3(d) Factor 3: Proportionality between the effects of the measures and the importance of the legislative objective. At the heart of the second limb to the

¹³⁹ *R v Schwartz* [1988] 2SCR 443, 492-493.

¹⁴⁰ Above n 135.

Oakes/Radio NZ test is the balancing of benefits and detriments, namely, the weighing of the benefits of the legislative objective against the detriments of the limiting provision (its detriments upon the human right invoked). This is possibly one of the most difficult issues involved in assessing the validity of counter-terrorist measures that limit human rights. It involves a balance between an objective and the means and effect of an implementing measure. “Objective” versus “means and effect” are, in a figurative sense, different sides of the same coin. The larger the head of the coin (objective), the more room there is on the tail of the coin (means and effect). Thus, a more severe threat will, by logical implication, justify the implementation of a more severe level of limitation of rights and freedoms.

The difficult nature of this part of the test, and its reliance upon its application to particular legislative provisions (rather than being able to provide a set of concrete principles) has been recognised by Jamal, Taylor and Stratas in their commentary upon the application of the test by the Supreme Court of Canada:¹⁴¹

The Court has said little to explain its approach with respect to this branch of the test, which appears to demand a balancing of benefits and detriments that cannot be fully articulated.

An examination of the relevant Supreme Court judgments reveals that the Court has indeed provided little, if any, general guidance. Its approach has been to consider the particular legislative provision and such a line is the only reasonable one to take, it is posited. Much will depend on the specific limitation in question and how it impacts upon rights and freedoms. The only truly ‘guiding’ principles are those set out by the Court in *R v Oakes* and *R v*

¹⁴¹ Jamal, Taylor and Stratas, above n 124, 6:09.

Lucas.¹⁴² The Court's original formulation of the substantive test in *Oakes* described the final step in the second limb of the test as requiring that:¹⁴³

There must be a proportionality between the effects of the measures or the law responsible for limiting the right or freedom and the objective – i.e., the law which restricts the right must not be so severe or so broad in application as to outweigh the objective.

In *R v Lucas*, the Court spoke of the need to assess the degree of protection afforded by the expression of the human right invoked, as well as the importance of the objective of the provision being examined. The case concerned the constitutionality of criminal prohibitions against defamatory libel. For the majority, Cory J stated:¹⁴⁴

Defamatory libel is so far removed from the core values of freedom of expression that it merits but scant protection. This low degree of protection can also be supported by the meritorious objective of the impugned sections. They are designed to protect the reputation of the individual.

In an attempt to at least formulate a process by which this limb of the test can be applied, having regard to the latter discussion, it is posited that the examination of statutory provisions will require consideration of the following factors:

- (a) The effect(s) of the limiting provision upon the right invoked;
- (b) The importance of the objective of that provision;
- (c) The importance of (or degree of protection provided by) the right invoked; and

¹⁴² *R v Lucas* [1998] 1 SCR 439.

¹⁴³ Above n 132.

¹⁴⁴ Above n 142, 94-95.

- (d) An assessment of whether the effect (a) is proportional to the objective (b), having regard to the importance of the right (c).

These factors will indeed call for a section-by-section analysis, which will be undertaken through the balance of this thesis. However, something that can be discussed at this stage (at least at a preliminary level) is the question of how to measure the importance of the objective (part (b) of the factors just listed). This chapter has clearly identified views that terrorism is a threat to human rights and to peace and security.¹⁴⁵ How big, however, is that threat? How should the threat be measured? As a threat to New Zealand? Or as one to the international community, with New Zealand as a responsible actor in that community? As identified earlier in this chapter, there are different ‘levels’ of threat posed by terrorism¹⁴⁶ and one must therefore consider which level of threat the provision being examined aims to respond to.

The matter is complicated by the fact that terrorism occurs on a sporadic basis. Due to the sensational and fear-inducing nature of terrorism, it is something that draws considerable media attention and has a high impact upon individual members of society and upon the credibility of the State to protect its citizens. As expressed by Professor Scott Davidson “headline issues call for headline responses”.¹⁴⁷ From a statistical perspective, however, it must be remembered that incidents of terrorism are considerably lower than

¹⁴⁵ Discussed above at 5.1 The Impact of Terrorism on Security and Human Rights.

¹⁴⁶ Discussed above at 5.1.3 An Overview of United Nations Observations.

¹⁴⁷ Discussion between the author and Professor Davidson, University of Canterbury, 2 February 2005.

other fatal events. In the twenty years up to September 11, the incidents of terrorist conduct fluctuated from the high 200s to the high 600s.¹⁴⁸

Next, one will also need to consider national versus international interests. In plain words, is the objective of the counter-terrorist provision to be assessed in terms of countering terrorism's adverse impacts upon human rights and security for New Zealand, or for the international community? This is also a significant question, since it is arguable that the threat of terrorism to New Zealand is significantly less than that to the international community at large. Certainly, that was the position advocated within many submissions made to the Foreign Affairs Defence and Trade Committee on the Terrorism <Bombings and Financing> Suppression Bill.¹⁴⁹ As discussed in detail within Chapter Two, however, the reality of the contemporary world is that globalisation has dissolved distances that may have once protected Pacific Island States such as New Zealand, despite its geographical isolation.¹⁵⁰ As also discussed, the various international conventions and protocols on the subject of counter-terrorism, coupled with resolutions of the Security Council

¹⁴⁸ United States Department of State, *Patterns of Global Terrorism 2001*, May 2002. In reviewing patterns over a twenty-year period from 1981, the report also identifies that the least number of terrorist attacks, at 274, was recorded in 1998, with the highest number of incidents in 1987 at 666 attacks. It should be noted, of course, that a total of 3,030 people died during the September 11 attacks, as recorded in the remembrance pages of September 11 News.com, URL <<http://www.september11news.com/911Art.htm>> at 7 January 2005. See also the discussion on this point in Chapter Two at 2.1.3 *The Concept of Terrorism*, especially note 39.

¹⁴⁹ See Submissions to the Foreign Affairs, Defence and Trade Committee on the Terrorism <Bombings and Finance> Suppression Bill, Parliamentary Library, Wellington, 2002, including for example submissions by the Indonesian Human Rights Committee, TERRO/88.

¹⁵⁰ Chapter Two, 2.4 New Zealand's Role in International Counter-Terrorism.

and General Assembly, create and *international* framework for counter-terrorism which relies on the participation of all States.¹⁵¹

The answer, then, might be two-fold. If a particular limiting measure is furthering the international framework on counter-terrorism, then the importance of the objective of that limiting measure should be assessed having regard to the various factors identified concerning the importance of countering international terrorism.¹⁵² If a particular limiting measure is aimed at combating a particular threat posed to New Zealand, such as bio-terrorism for example, then that objective should be measured against that particular threat.

These are all matters that bear upon the importance of the objective being pursued by the statutory provision under examination and will, as a result, directly bear upon the question of whether its effect is proportional.

5.4.3(e) *A summary on proportionality.* The question of proportionality is clearly a difficult one, with much depending on the particular legislative provision being examined and the impact of that provision upon the particular right concerned. Against the background of the discussion to this point on proportionality, the following three-step guidelines are advocated for

¹⁵¹ Ibid, see in particular 2.4.4 *Supporting an International Framework on Counter-Terrorism.*

¹⁵² See above at 5.1.3 *Summary of United Nations Observations.*

determining whether limitations imposed by a statutory counter-terrorist measure are proportional:

- Step 1: Is the legislative provision rationally connected to the achievement of the objective?

In establishing a rational connection between the statutory provision and its objective, it will be sufficient to show that the provision logically furthers counter-terrorism (whether the international counter-terrorism regime or particular threats faced by New Zealand). Where the connection between the provision and objective is not plainly evident, however, evidence linking the two may be required.

- Step 2: Does the legislative provision impair the right to a minimal extent?

The legislative provision must impair the right as little as reasonably possible. In determining whether that has occurred, a degree of deference should be paid to allow for Parliamentary discretion in determining what means to implement. A more thorough examination of alternative measures will be called for in instances where the human rights interference is more than minimal, or trivial.

- Step 3: Are the effects of the legislative provision proportional to the importance of its objective?

Here, consideration of the following factors is advocated:

- (a) The effect(s) of the limiting provision upon the right invoked;
- (b) The importance of the objective of that provision;

- (c) The importance of (or degree of protection provided by) the right invoked; and
- (d) An assessment of whether the effect (a) is proportional to the objective (b), having regard to the importance of the right (c).

Although this will require an assessment of the particular counter-terrorist provision and the particular right invoked, some principles are applicable to the assessment of 'factor (b)' - namely, consideration of two questions:

- (1) how does the legislative provision further the pursuit of countering international terrorism (and thereby contribute to the international framework on counter-terrorism); and
- (2) is the provision directed at a threat against the territorial integrity of New Zealand or the protection of its people (and how pressing or substantial is that threat)?

5.5 The Interaction between Domestic and International Human Rights Obligations

The final question posed in the introduction to this chapter was how the ICCPR and NZBORA were to interact and, in particular, what the consequences would be of finding that a provision of New Zealand's counter-terrorist legislation is valid under one, but not the other, instrument. The interaction between these two instruments, which are the primary civil and political rights instruments relevant to New Zealand, is interesting from a theoretical perspective and also raises some important issues from a practical perspective when seeking to measure particular provisions of New Zealand's counter-terrorist legislation against the ICCPR and NZBORA.

5.5.1 *The Interaction between the ICCPR and NZBORA*

Broadly speaking, the first point to note concerns international constitutional-type matters. New Zealand is an independent, sovereign State at international law and, as such, is free to determine how to carry out its international affairs and how to regulate matters within its municipal dominion.¹⁵³ With that freedom comes the ability to limit one's own sovereignty, which is the foundation upon which States enter into international agreements and undertake to act in certain ways, either in their relations with others in the international community, or in respect of the treatment of nationals or aliens within their territory.¹⁵⁴ New Zealand has, in that context, elected to surrender its sovereignty over its internal affairs to the extent that it has undertaken to treat individuals within its territory in compliance with the International Covenant on Civil and Political Rights. In doing so, New Zealand has agreed to be subject to the reporting and review mechanisms established under the ICCPR (involving the Human Rights Committee).¹⁵⁵ New Zealand has also elected to allow those within New Zealand's territory to communicate directly with the Human Rights Committee when an alleged victim of a violation of the ICCPR has exhausted local remedies.¹⁵⁶ As discussed in Chapter Four, the New Zealand Bill of Rights Act is the primary domestic instrument

¹⁵³ New Zealand is a member State of the United Nations, membership of which is only open to all "peace-loving states" (article 5 of the Charter of the United Nations). Arbitrator Max Huber, in describing the sovereignty that comes with Statehood in the *Island of Palmas Case* (2 RIAA 829), declared that this was the right to perform governmental actions to the exclusion of all others within the territory of a State.

¹⁵⁴ *The Wimbledon* (decision of the Permanent Court of International Justice), 2 ILR 99.

¹⁵⁵ Discussed in Chapter Four, at 4.3.1 *The International Covenant on Civil and Political Rights*.

¹⁵⁶ *Ibid.*

through which New Zealand has incorporated those international obligations into municipal law.

It is against that background that one can view the broad relationship between the ICCPR and NZBORA, although this does depend somewhat upon the lens through which one considers the instruments. Through a domestic judicial lens, the primary focus of New Zealand courts is naturally upon the Bill of Rights, although the ICCPR can be instructive on the meaning of rights and the remedies that might flow from any finding that rights have been violated.¹⁵⁷ By way of corollary, the New Zealand courts have also commented that their determination of matters under the NZBORA might be instructive to the Human Rights Committee when considering any matter before it concerning an allegation of violation of rights.¹⁵⁸ The Human Rights Committee, viewing matters from an international judicial lens, likewise focuses upon the instrument it has been established to monitor. In doing so, it has tended to view the NZBORA as simply one item (albeit the principal one) of legislation through which the ICCPR is to be implemented.¹⁵⁹ Its concern is not with any one particular item of domestic legislation, but with the overall structure of domestic law and ensuring that the provisions of the ICCPR are adhered to through that overall structure.

¹⁵⁷ Discussed in Chapter Four, 4.2 Why Consider Human Rights in the Examination of Counter-Terrorist Legislation?.

¹⁵⁸ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17 (para 20).

¹⁵⁹ This can be gleaned through the overall content of comments by the Human Rights Committee in response to New Zealand's periodic reports: see, for example, the Committee's comments on the two most recent reports by New Zealand, Concluding observations of the Human Rights Committee: New Zealand, 24 March 1995, CCPR/C/79/Add.47, and Concluding observations of the Human Rights Committee: New Zealand, 17 July 2002, CCPR/CO/75/NZL.

As will be seen in the three chapters that follow, the latter background shapes the basis upon which New Zealand's domestic counter-terrorist legislation is examined. If the ICCPR has been properly implemented into New Zealand law, then the result of examining any statutory counter-terrorism measure under each instrument should be the same. Chapter Seven of this thesis, examining the terrorist designation process under the Terrorism Suppression Act, is evidence that this will not always be the case. The question, then, is how to deal with differing results.

Two possibilities arise. The first is where a statutory counter-terrorism measure is found to be consistent with the ICCPR but in violation of the NZBORA. The author posits that, due to the operative provisions of the NZBORA and the sometimes aspirational character of the ICCPR, this is an unlikely result. Certainly, it is not one that is arrived at anywhere in this thesis. If that outcome was arrived at, however, it would not (it is suggested) be a problematic outcome. Rather, it would simply be an exercise of territorial sovereignty by New Zealand which was consistent with the ICCPR. Any counter-terrorist provision in violation of the NZBORA would, through the New Zealand courts, require practical forms of remedy to be granted or might even result in law reform following a declaration of incompatibility. While this might go beyond the scope of rights-protection envisaged within the ICCPR, there are no international implications to such a result. If anything, the Human Rights Committee would likely praise New Zealand for it.

It is the alternative possibility that causes problems and requires further thought. That is, where a statutory counter-terrorism measure is found to be

‘valid’ (or not ‘invalid’) for the purposes of the NZ Bill of Rights Act but in violation of the ICCPR. In this second situation, there are international implications (resulting from New Zealand’s surrender of sovereignty under the ICCPR) and the Human Rights Committee would, it is posited, be likely to make adverse comments against New Zealand (either through the periodic reporting system or as a result of an individual communication to the committee). What are the implications of the latter outcome?

5.5.2 *‘Valid’ at Domestic Law but Contrary to the ICCPR*

A preliminary matter, concerning terminology, needs to be explained before discussing the implications of the outcome just identified. First, when talking of an outcome that is ‘valid’ at domestic law, this is used to signify an outcome where the NZBORA cannot be used to invalidate the statutory counter-terrorist measure. This might result from the particular meaning of the right or freedom (as expressed under the NZBORA), or by operation of section 4 of the NZBORA. Next, when speaking of an outcome that, while valid at domestic law, is contrary to the ICCPR, this is meant to signify that the outcome does not fit within one of the permissible limitations within the ICCPR. As will be discussed, however, the outcome might otherwise be ‘acceptable’ at international law.

5.5.2(a) *The ‘normal course’ in finding a conflict.* Where a counter-terrorism provision is found to be ‘valid’ at domestic law but contrary to the ICCPR, the matter will not normally involve any inquiry of whether that provision is otherwise ‘acceptable’. The normal outcome will be simple: the provision cannot be invalidated under the NZBORA (or is otherwise consistent with the

NZBORA's description of the human right in question) but it is contrary to an article(s) of the ICCPR. This will be particularly so when a statutory provision is only saved by application of section 4 of the Bill of Rights, which effectively stands as an acknowledgement that the provision is in an irreconcilable conflict with a human rights provision of the NZBORA. What, then, is the normal course in such circumstances?

The starting point is article 27 of the Vienna Convention on the Law of Treaties, which concerns situations where domestic law is in conflict with treaty law (the situation at hand):¹⁶⁰

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Article 27 stands as a codification of one of the most important rules of international law, as first expressed in the *Alabama Claims Arbitration*.¹⁶¹ In a claim against the United Kingdom by the United States, the UK had unsuccessfully tried to rely on the absence of domestic legislation (prohibiting the fitting out of commerce raiders in British ports that were to join the Confederated forces in America) as a defence to the international law rule requiring States to remain neutral in matters of internal conflicts within other States. International courts and tribunals have produced a consistent jurisprudence to the effect that internal rules can never be used to justify a breach of international obligations.¹⁶²

Applying this principle to the matter at hand, New Zealand could not claim that, since a counter-terrorist provision was not invalidated by domestic

¹⁶⁰ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

¹⁶¹ *Alabama Claims Arbitration* (1872) Moore, *International Arbitrations*, 653.

¹⁶² For further discussion on this point, see Brownlie, above n 111, 34-35.

legislation (the NZBORA), then this rendered any inconsistency with the ICCPR as defensible. As such, New Zealand would be subject to adverse comments from the Human Rights Committee, whether as a result of the periodic reporting regime or an individual complaint under the ICCPR Optional Protocol.

5.5.2(b) The 'exceptional course' of rendering a conflict otherwise acceptable. The ability will be limited, it is envisaged, to argue that although a statutory counter-terrorism measure is contrary to the ICCPR it is otherwise 'acceptable'. In exceptional circumstances, however, this may be a possibility. Consider the hostage-taking example given earlier:

Section 48 of the Crimes Act 1961 (self-defence) cannot be invalidated under the New Zealand Bill of Rights Act 1990, by virtue of the fact that it is a provision of an enactment and is therefore saved by application of section 4 of the NZBORA. In the admissibility phase of proceedings before the Human Rights Committee, the Committee finds that the communication against New Zealand is admissible and that there has been a prima facie violation of article 6(1) of the ICCPR.

How might New Zealand respond for the purpose of the merits phase of the communication before the Committee? It would no doubt want to argue that the killing of T was not arbitrary, and therefore not falling within the article 6(1) prohibition against the arbitrary taking of life.¹⁶³ Consideration of this position, above, led to the author to posit that this was a proper conclusion to arrive at (on the facts). What if, however, the Human Rights Committee took issue with the subjective nature of the section 48 self-defence provision of the

¹⁶³ This has been discussed in further detail above, at 5.3.2 *The Fiction of Non-Derogable Rights*.

Crimes Act?¹⁶⁴ Although the author considers this to be an unlikely outcome, it illustrates the problem at hand: section 48 is not 'invalid' at domestic law by reason of section 4 of the NZBORA, but it is (for argument's sake) contrary to the ICCPR.

Notwithstanding this fictional result, it is posited that the facts of the scenario could give rise to the exceptional course of rendering the conflict with the ICCPR otherwise 'acceptable' at international law. By adopting the arguments of distress and anticipatory self-defence, as discussed earlier, New Zealand could take the position that - notwithstanding the (technical) breach of the ICCPR - section 48 and the conduct of S were otherwise acceptable at international law as well as at domestic law. The taking of T's life occurred in an instant, overwhelming situation, leaving no choice of means, and no moment for deliberation,¹⁶⁵ and undertaken as the only reasonable way to save the hostage's life.¹⁶⁶

The other factor to consider when contemplating inconsistent outcomes in the application of the ICCPR and the NZBORA are the international guidelines on the subject. Discussed earlier within this chapter have been guidelines of the International Commission of Jurists, the Advisory Council of Jurists, the High Commissioner for Human Rights and the Sub-Commissioner

¹⁶⁴ Section 48 contains both objective and subjective elements. The subjective element is that the conduct is measured against the circumstances believed to exist by the person acting in self-defence. The objective element is that the conduct of the person must be reasonable. For further discussion, see Robertson JB (ed), *Adams on Criminal Law*, (Brooker & Friend, New Zealand, Loose Leaf, 1992-), CA48.07 and CA48.08.

¹⁶⁵ Adopting the words of the *Caroline Case*, above n 112.

¹⁶⁶ Adopting the words of article 24 of the Articles on State Responsibility.

for Human Rights Special Rapporteur.¹⁶⁷ Also considered was the relationship between these sources of 'soft law' and the limitations test under section 5 of the New Zealand Bill of Rights Act 1990.¹⁶⁸ The conclusion made was that the section 5 limitations test (as expounded in the *Radio NZ* and *Oakes* cases) is consistent with those international guidelines. Despite the soft law status of the guidelines, it is the view of the author that this level of consistency is of considerable value for two reasons. Firstly, the various guidelines are consistent with each other. Secondly, they are specifically concerned with the interface between counter-terrorism and human rights - unlike the ICCPR, an instrument in which rights and freedoms are expounded in a more 'abstract' manner.

There is an important qualifying point to be made about the latter argument, however. As 'soft law' guidelines, reliance upon the guidelines cannot render any conflict with the ICCPR justifiable at law. Strictly speaking, reliance on non-binding international standards or guidelines can only justify a breach of the ICCPR on a policy level. For that reason, it is quite possible that the Human Rights Committee would still make adverse comments about such a breach of the ICCPR, notwithstanding what the author sees as a justifiable policy basis for breach. However, anticipating the approach of the Committee is difficult. Although members of the Committee have formally rejected a 'margin of appreciation'¹⁶⁹ doctrine,¹⁷⁰ commentators

¹⁶⁷ Discussed above at 5.3.3 *Commission on Human Rights* and 5.3.4 *Other International Bodies*.

¹⁶⁸ Discussed above at 5.4.2 *Application of the Substantive Test under section 5*, and 5.4.3(a) *Does section 5 fit with external guidelines on counter-terrorism and human rights?*

¹⁶⁹ A doctrine utilised by the European Court of Human Rights and defined by Eyal Benvenisti as "the notion that each society is entitled to certain latitude in resolving

have identified “incipient elements of the doctrine in some of the HRC’s jurisprudence”.¹⁷¹

By way of summary, then, New Zealand has surrendered its sovereignty over the manner in which it deals with persons within its territory, to the extent of the obligations it has undertaken through its party status to the ICCPR. Those obligations have been incorporated into domestic law through various New Zealand Acts of Parliament, primarily through the NZBORA. The manner of incorporation, however, may lead to the possibility of differing results in the application of the ICCPR versus the NZBORA to statutory counter-terrorist provisions. The most likely outcome, in that regard, is a finding that a counter-terrorist provision is ‘valid’ under domestic law (through application of the NZBORA) but contrary to the ICCPR.

The normal course in finding such a conflict will be that New Zealand is in breach of its international obligations (under the ICCPR), notwithstanding its domestic law. It will, as such, be subject to adverse comments and directions from the UN Human Rights Committee. In exceptional circumstances, however, it has been argued that there may be other reasons for treating the ICCPR violation as ‘acceptable’. In the fictional analysis undertaken, for example, application of the principles of State Responsibility

the inherent conflicts between individual rights and national interests or among different moral convictions”: Benvenisti E, “Margin of Appreciation, Consensus, and Universal Standards” (1999) 31 *International Law and Politics* 843, 843-844. For a comprehensive discussion of the doctrine, see Arai-Takahashi Y, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

¹⁷⁰ Former Judge Rosalyn Higgins, for example: see Ghandi PR, *The Human Rights Committee and the Right of Individual Communication* (Ashgate Dartmouth Publishing Ltd, 1998), 14.

¹⁷¹ Professor Scott Davidson in Conte, Davidson and Burchill, above n 103, 11. See also Harris D and Joseph S (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, 1995), 629.

and the notion of anticipatory self-defence have been argued as validating the conduct of the SAS soldier in the taking of the terrorist's life in order to save the life of the hostage.

5.6 Counter-Terrorism and Privacy

Warranting some specific attention is the question of the interface between counter-terrorism and privacy. Although the right to privacy is a matter addressed within the ICCPR, it is outside the ambit of the Bill of Rights, instead gaining protection under the Privacy Act 1993. Privacy, says Professor Emanuel Gross, is a deeply rooted value in human culture comprising (1) the right of the individual to be left alone, (2) the right of the individual to have control over the dissemination of information about him or her and the access to his or her person and home, and (3) the right to be protected against the unwanted access of the public to the individual.¹⁷² Notwithstanding the importance of the right to privacy Professor Gross argues that, from both a legal and moral perspective, interference with privacy in pursuit of national security is permissible.¹⁷³

Contrary to privacy, absolute security is the utopian idea, and therefore "national security" as a whole is worthy of legal protection in the sense that the state has the duty and the right to protect itself and the persons who are located within its borders against security threats.

¹⁷² Gross E, "The Struggle of a Democracy Against Terrorism. Protection of Human Rights: The Right to Privacy Versus the National Interest – the Proper Balance" (2004) 37(1) *Cornell International Law Journal* 27, 31.

¹⁷³ *Ibid*, 35.

Under the International Covenant on Civil and Political Rights, privacy is a matter addressed in article 17:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Thus, as far as the ICCPR is concerned, the State is obliged to both *desist* from interfering with privacy, as well as to legislate in a way that *protects* the right to privacy (from both State authorities and natural persons).¹⁷⁴ The protection of privacy is, however, a necessarily relative matter as a result of the fact that all persons live in a society.¹⁷⁵ The Human Rights Committee has pointed out that the term “unlawful” within paragraph 1 of article 17 means that an authorisation to interfere with privacy must be established by law, so long as this does not establish an arbitrary authority.¹⁷⁶ The international guidelines on counter-terrorism and human rights also require that any limitation upon rights be reasonable and proportional.¹⁷⁷

In contrast to the International Covenant, the Privacy Act 1993 is weaker in its protection of the privacy of New Zealanders. Through the application of general principles of statutory interpretation, the impact of the Act is limited

¹⁷⁴ United Nations Human Rights Committee, General Comment No 6, *Article 17*, HRI/GEN/1/Rev.1 (1988), paras 1 and 9.

¹⁷⁵ *Ibid*, 7.

¹⁷⁶ *Ibid*, 3. See, for discussion, Conte, Davidson and Burchill, above n 103, 147.

¹⁷⁷ Although these are not an express requirements of either the Privacy Act 1993 or any other legislation governing the issuing of interception warrants, proportionality and reasonableness are required of the international guidelines on counter-terrorism and human rights: see Chapter Five, in particular 5.2.3 *Commission on Human Rights*, 5.2.4(b) *Council of Europe*, and 5.4.3(a) *Does the section 5 proportionality test fit with the external guidelines on counter-terrorism and human rights?*

to governing the collection of “personal information”¹⁷⁸ where this occurs outside a statutory authority to do so. Where a statute specifically authorises the collection (or interception) of personal information, then the rules of ‘reconciliation’, ‘implied repeal’, and *generalia specialibus non derogant* mean that (unless the statute can be interpreted in a manner that is consistent with the Privacy Act) the statutory provision remains unaffected by the Privacy Act.¹⁷⁹ The strength of the Privacy Act is in regulating an agency (such as a hospital or university) in its collection and storage of personal information. In that case, that the agency must comply with the twelve privacy principles set out in section 6 of the Privacy Act. Of particular importance, privacy principle 5 prohibits the collection of personal information by unlawful means or in a manner that is unfair or unreasonably intrudes upon the personal affairs of an individual. Notably, this principle does not apply to the collection of information by the New Zealand Security Intelligence Service or the Government Communications Security Bureau.¹⁸⁰

In summary, then, interference with privacy at the domestic law level is only permissible to the extent that such interference either complies with the information privacy principles (section 6 of the Privacy Act), or is expressly authorised under an enactment which prevails by application of the principles

¹⁷⁸ Defined by section 2 of the Privacy Act 1993 as information about an identifiable individual.

¹⁷⁹ *Reconcilitaion* reflects the aim of the courts to find a construction of two conflicting statutory provisions that reconciles that inconsistency and allows the provisions to stand together. *Implied repeal* results in a statute later in time impliedly repealing an earlier and totally inconsistent statute. *Generalis specialibus non derogant* means that an earlier, more specific, statutory provision prevails over a later, general statutory provision. See Burrows JF, *Statute Law in New Zealand* (3rd ed, LexisNexis, 2003), 308-317.

¹⁸⁰ Section 57 of the Privacy Act 1993 expresses that principles 1 to 5 and 8 to 11 do not apply to information collected by an “intelligence organisation” (defined under section 2 as the New Zealand Security Intelligence Service and the Government Communications Security Bureau).

of *implied repeal* and *generalia specialibus non derogant*. To comply with the ICCPR and the international standards on counter-terrorism and human rights,¹⁸¹ legislative authorisations to interfere with privacy must: (1) not permit arbitrary interference; (2) protect the individual against arbitrary or unlawful interference; and (3) be reasonable and proportional.

5.7 Conclusion

The aim of this chapter has been to draw out principles to be applied in the examination of any perceived conflict between counter-terrorist legislation and human rights standards. In particular, the analysis has sought to understand how to resolve conflicts between New Zealand's counter-terrorist legislation and its human rights obligations under the International Covenant on Civil and Political Rights and the New Zealand Bill of Rights Act 1990. The need to do so has become apparent through the identification in Chapter Three of this thesis of potential conflicts between counter-terrorist legislation and human rights. It has also been seen that such concerns have been expressed about States.

The preliminary focus of this chapter, before considering the particular limiting provisions of the International Covenant and the Bill of Rights, has been upon two issues. Firstly, what sort of impact do terrorist acts have on human rights and security? Secondly, is compliance with human rights necessary when seeking to implement counter-terrorist objectives? The conclusions drawn through this first part of the chapter have been reasonably

¹⁸¹ As discussed earlier in this chapter: see, in particular, 5.2.3 *Commission on Human Rights*, 5.2.4(b) *Council of Europe*, and 5.4.3(a) *Does the section 5 proportionality test fit with the external guidelines on counter-terrorism and human rights?*

obvious and straight-forward: terrorism adversely impacts upon both security and human rights but, despite this adverse impact, the means by which counter-terrorist measures are implemented must be in compliance with human rights. Terrorism has been identified by bodies within the United Nations as having links with transnational and other forms of serious crimes; as adversely impacting upon various rights and freedoms, including life, liberty, the rule of law and the functioning of pluralistic societies; and as negatively impacting upon the social development and territorial integrity of States and their international relations and co-operation with other States. Both the General Assembly and Security Council have identified counter-terrorism as an objective essential to the maintenance of international peace and security. Notwithstanding the importance of countering these affects, it is also clear that the pursuit of that objective must be in compliance with human rights standards. Of significant importance to this principle is the fact that human rights instruments themselves cater for the limitation of rights in the pursuit of pressing and substantial objectives.

The main focus of this chapter has been upon the feature of human rights instruments just mentioned: allowance for the limitation of rights. In the case of the International Covenant on Civil and Political Rights, it has been seen that there is no generally applicable limitations provision, other than article 4 (which limits itself to the suspension of rights during states of public emergency). In the absence of invoking article 4, the Covenant calls for the examination of legislative measures against the particular expression of rights within the ICCPR. In the case of article 4, it has been suggested that this provision is far from ideal in meeting the needs of counter-terrorism. To

begin with, there are problems with treating threats of terrorism as threats that give rise to a public emergency within the meaning of article 4 and otherwise comply with the temporary and exceptional nature of that provision. It has been posited that, although article 4 might be invoked to deal with a particular, instant, terrorist threat or event, it is not suitable as a means of justifying the suspension of rights on an on-going basis through counter-terrorist legislation. The second problem with article 4 lies in its distinction between derogable and non-derogable rights. It has been suggested that this represents a false dichotomy and that, while some rights might certainly be more significant than others, great care should be taken in asserting that any right is absolute.

Turning to section 5 of the New Zealand Bill of Rights Act 1990, it has been concluded that the various preliminary steps in its application, as well as the features of its substantive test, are consistent with the international guidelines on meeting the challenges of counter-terrorism in compliance with human rights. On the question of privacy, any interference with privacy must comply with the information privacy principles of the Privacy Act 1993 or otherwise be authorised by an enactment. In either case, any authorisation to interfere with privacy must not permit arbitrary interference, it must *protect* the individual against arbitrary or unlawful interference, and be reasonable and proportional.

Finally, this chapter has considered the question of differing results in the application of the ICCPR versus the NZBORA to the examination of statutory counter-terrorist measures. The possibility exists for differing results, particularly in light of the protective status afforded to enactments by section

4 of the Bill of Rights. Conflicts of this nature will normally occur in situations where the legislative provision is found to be 'valid' under domestic law but contrary to the ICCPR. The view taken has been that, in the normal course of finding such a conflict, this will mean that New Zealand is in breach of its international obligations and must - if it wants to comply with its international human rights obligations - take remedial steps. In rare cases, however, it has been suggested that non-compliance with the ICCPR might be rendered acceptable. This will be so where international law can be invoked to justify the legislative provision. It was posited, through examination of a fictional scenario, that this would be the case with the right to self-defence under section 48 of the Crimes Act 1961 and application of the international law principles of State responsibility and anticipatory self-defence. Validation might also occur where it could be shown that the statutory measure was justifiable under section 5 of the New Zealand Bill of Rights Act, that provision (as mentioned earlier) being compatible with the international guidelines on the interface between counter-terrorism and human rights.

Chapter 6

The United Nations Act 1946 and the Safeguarding of Human Rights in Executive Law-Making

The New Zealand's counter-terrorist obligations under UN Security Council Resolution 1373 were, as discussed within Chapter Three, implemented under regulations made pursuant to the United Nations Act 1946.¹ Resolution 1373 placed particular emphasis on the issue of the financing of terrorism, calling upon States to become party to the International Convention for the Suppression of the Financing of Terrorism² and requiring certain steps to be taken in the prevention and suppression of terrorism. New Zealand's immediate response, by interim measure, was to make the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 (the Terrorism Regulations), pursuant to an empowering provision in the United Nations Act.³

The object of this thesis is to examine the interface between counter-terrorist legislation and human rights. Within that context, this chapter

¹ United Nations Security Council Resolution 1373 of 28 September 2001, S/RES/1373 (2001).

² Opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

³ The United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 came into force on 1 December 2001 and were to expire on 30 June 2002 (by which time it was expected that the Terrorism Suppression Bill would have passed through Parliament). Due to the early dissolution of Parliament, however, (prompted by early elections in July 2002), the life of the Regulations were extended to 31 December 2002 by the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Amendment Regulations 2002.

examines the potential impact of the Terrorism Regulations upon human rights. In doing so, it will be concluded that there are no issues of concern, but an interesting aspect of the traditional tension between the Executive and Legislature is exposed. There has been, as reflected within the Magna Carta of 1215 and the Bill of Rights of 1688, a long-standing tension between the need for the Executive to have the ability to carry out certain functions, and the sovereignty of Parliament to legislate without interference. Although the issues to be discussed are not limited to the regulations made by New Zealand in response to Resolution 1373, those regulations illustrate an exercise of the regulation-making powers of the New Zealand Government in respect of obligations imposed upon it by the United Nations Security Council. Particular attention is paid to the interaction between regulations made under the United Nations Act and rights and freedoms guaranteed under the New Zealand Bill of Rights Act 1990, this heightening the tension because of Parliament's role as "guardian of the public interest".⁴

6.1 The United Nations Act 1946

In New Zealand, resolutions made by the United Nations Security Council under Chapter VII of the Charter of the United Nations, and the obligations

⁴ It is, naturally, contestable whether Parliament or the Judiciary is the ultimate "guardian" of the public interest, although most would agree that both are responsible for this, a matter outside the scope of discussion within this chapter. Notably, however, that phrase was used by the Regulations Review Committee when discussing the issue of abrogation of human rights: see Report of the Regulations Review Committee, *Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments*, NZAJHR (2002) I. 16H, 16.

they impose upon New Zealand, are given effect to through the United Nations Act 1946, its preamble stating that it is:

An Act to confer on the Governor-General in Council power to make regulations to enable New Zealand to fulfil the obligations undertaken by it under Article 41 of the Charter of the United Nations.

Section 2(1) of the Act provides that if the Security Council calls upon the New Zealand Government to apply any particular measures to give effect to a decision of the Council, then the Governor-General in Council may make "...all such regulations as appear to him to be necessary or expedient for enabling those measures to be effectively applied". Regulations made under the United Nations Act (United Nations regulations) fall within the category of what are known as *Henry VIII Clauses*, enabling provisions that authorise the regulations made thereunder to override primary legislation. Sub-section (2) states:

No regulation made under this Act shall be deemed to be invalid because it deals with any matter already provided for by an Act, or because of any repugnancy to any Act.

New Zealand has made various regulations under the United Nations Act in response to sanctions imposed by the Security Council.⁵ Although the Act

⁵ The extant regulations made under the United Nations Act 1946 are:

- United Nations Sanctions (Afghanistan) Regulations 2001, made for the purpose of giving effect to Security Council Resolutions 1267 of 15 October 1999, S/RES/1267 (1999); and 1333 of 19 December 2000, S/RES/1333 (2000).
- United Nations Sanctions (Democratic Republic of the Congo) Regulations 2004, made for the purpose of giving effect to Security Council Resolutions 1493 of 28 July 2003, S/RES/1493 (2003); and 1552 of 27 July 2004, S/RES/1552 (2004).
- United Nations Sanctions (Iraq) Regulations 1991, made for the purpose of giving effect to Security Council Resolutions 661 of 6 August 1990, S/RES/661 (1990); 670 of 25 September 1990, S/RES/670 (1990); 686 of 2 March 1991, S/RES/686 (1991); and 687 of 3 April 1991, S/RES/687 (1991).
- United Nations (Iraq) Reconstruction Regulations 2003, made for the purpose of giving effect to Security Council Resolution 1483 of 22 May 2003, S/RES/1483 (2003).

is principally intended to respond to the making of sanctions by the Security Council, which tend to be of an interim nature, the Act does not contain any provision linking the life of United Nations regulations to the life of the corresponding sanctions.

6.2 Regulation-Making Powers in New Zealand

In March 2002, the Regulations Review Committee of New Zealand's Forty-Sixth Parliament presented a report entitled *Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments* to the House.⁶ The report is not directly on point, but there are principles enunciated within it that are relevant to the question of the Executive's regulation-making powers under the United Nations Act and to the interaction between such regulations and the New Zealand Bill of Rights Act.

As the title suggests, the report of the Regulations Review Committee is concerned with regulations that authorise international treaties to

-
- United Nations Sanctions (Kimberley Process) Regulations 2004, made for the purpose of giving effect to Security Council Resolutions 1306 of 5 July 2000, S/RES/1306 (2000); and 1343 of 7 March 2001, S/RES/1343 (2001).
 - United Nations Sanctions (Liberia) Regulations 2001, made for the purpose of giving effect to Security Council Resolution 1343 of 7 March 2001, S/RES/1343 (2001).
 - United Nations Sanctions (Rwanda) Regulations 1994, made for the purpose of giving effect to Security Council Resolution 918 of 17 May 1994, S/RES/918 (1994).
 - United Nations Sanctions (Sierra Leone) Regulations 1997, made for the purpose of giving effect to Security Council Resolution 1132 of 8 October 1997, S/RES/1132 (1997).
 - United Nations Sanctions (Somalia) Regulations 1992, made for the purpose of giving effect to Security Council Resolution 733 of 23 January 1992, S/RES/733 (1992).
 - United Nations Sanctions (Sudan) Regulations 2004, made for the purpose of giving effect to Security Council Resolution 1556 of 30 July 2004, S/RES/1556 (2004).

⁶ Report of the Regulations Review Committee, *Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments*, NZAJHR (2002) I. 16H.

override any Act of Parliament, the view of the Committee being that (as a principle) only Acts should be able to amend other Acts. While this focus on international treaties is due to the particular terms of reference of the Committee inquiry,⁷ it is most unfortunate that the Committee did not concern itself in any detail with regulation-making powers that might authorise obligations under the United Nations Charter (which is, after all, one of the most important multilateral treaties in existence) to override any Act of Parliament.⁸ The Committee took a peculiar approach to the issue of section 2 of the United Nations Act. On the one hand, it noted concern with the breadth of these regulation-making powers. It nevertheless dismissed the need to review those powers, stating:⁹

We do not seek review of section 2(2) of the United Nations Act 1946, as this provision falls within the exceptional circumstances in which regulation-making powers authorising overriding treaty regulations are justifiable...

The Committee did not, however, explain the basis for this conclusion.

While the issue might appear to be narrow in its focus, it is regrettable that it has not been fully considered since it is one that goes to the heart of the

⁷ The Committee's terms of reference required it to consider: (1) The circumstances in which regulation-making powers that authorise international treaties to override any provisions of New Zealand enactments have been used; (2) Alternative means of implementing international treaties into New Zealand law by regulations that do not authorise the provisions of a treaty to override any provisions of New Zealand enactments; (3) The appropriateness of enacting regulation-making powers to implement international treaties into New Zealand law, notwithstanding the provisions of any other enactment; (4) General principles for identifying if and when it is appropriate to enact regulation-making powers that authorise international treaties to override any provisions of New Zealand enactments; and (5) What limits should be imposed on prescribing regulations to implement international treaties by overriding any provisions of New Zealand enactments.

⁸ It is unclear why the report does not consider the Charter of the United Nations, since this is an instrument that would appear to fall within the terms of reference (*ibid*).

⁹ Above n 6, 29.

Committee's inquiry – the balance between Executive law-making authority and Parliamentary sovereignty. That, in turn, is an issue that is of central importance to this thesis. It should by this stage of the work be apparent that consideration of the interface between counter-terrorism and human rights is, at a domestic level, one that concerns all three branches of the State and involves the separation of powers of each branch and the ability of one to check the other.

Notwithstanding the lack of direct consideration of the United Nations Act, there are various matters discussed within the report, and recommendations made, that are of relevance to the regulation-making power under this legislation. To begin with, the Regulations Review Committee was critical of Henry VIII Clauses, the overriding message of the Committee being that regulation-making powers should enable the derogation of an Act of Parliament only in exceptional circumstances.¹⁰ It accordingly recommended that the House consider limiting such powers in a number of ways, with the following suggestions having some bearing on the power within the United Nations Act:¹¹

- Limiting enabling provisions to override the principal Act only;¹²
- Expressing the particular primary legislation provisions that may be overridden by such regulations;¹³

¹⁰ Ibid, recommendation 1, 17. See also the Regulation Review Committee's discussion of Henry VIII Clauses at page 15 and an earlier report of the Committee concerning such clauses: *Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period*, NZAJHR (1995) I. 16C.

¹¹ A number of the recommendations reflect those made by an earlier Committee in its 1995 report, above n 6, 22.

¹² See Recommendation 3(2), *ibid*, 4: discussed within pp.21–22 of the report.

¹³ See Recommendations 3(3) and 4, *ibid*, 4: discussed within pp.21–23 of the report.

- Limiting such operation to matters of a technical nature or emergency measures;¹⁴
- Providing for additional Parliamentary scrutiny of any such regulations;¹⁵ and
- Prohibiting the derogation of the common law and the New Zealand Bill of Rights Act 1990.¹⁶

Of those recommendations, some warrant further consideration, others only brief mention.

As well as enabling the making of regulations, the United Nations Act provides for liability for breach of any regulations made under the Act and application of the Act in the Cook Islands.¹⁷ That is, however, the extent of the Act. The first recommendation listed above can therefore have little application to the Act, the sole purpose of which is to establish a mechanism by which the New Zealand Government can comply with decisions of the UN Security Council.

The second recommendation listed, pertaining to explicit reference within an empowering provision to statutory provisions that may be overridden by such regulations, is self-explanatory and does not need any further consideration. This will effectively be a question for Parliament to

¹⁴ See Recommendation 2, *ibid*, 4; discussed within pp.19–20 of the report.

¹⁵ See Recommendation 5, *ibid*, 4; discussed within pp.23–26 of the report.

¹⁶ See Recommendation 3(4), *ibid*, 4; discussed within pp.16 and 22 of the report.

¹⁷ See sections 3 and 4 of the United Nations Act 1946. The application of the Act to the Cook Islands is a carryover of New Zealand's former governance over the Cook Islands as a 'non-self-governing territory'. The Cook Islands became self-governing in free association with New Zealand on 4 August 1965 and has the right at any time to move to full independence by unilateral action: see Countryreports.org, 'Cook Islands' URL <<http://www.countryreports.org/country.asp?countryid=58&countryName=Cook%20Islands>> at 20 March 2005. Against that background, section 4 of the United Nations Act 1946 provides:

4. Application to Cook Islands and other territories

(1) This Act shall be in force in the Cook Islands and, to the extent to which Her Majesty has jurisdiction therein, in every other territory for the time being administered by Her Majesty's Government in New Zealand.

(2) Except so far as otherwise expressly provided, regulations made under this Act shall not be in force in the Cook Islands or in any such territory as aforesaid.

answer. The remaining suggestions do, however, raise some interesting issues for United Nations regulations and might assist in deciding the level to which these regulations can and should override primary legislation.

6.2.1 *Limiting Enabling Provisions to Emergency Measures*

Although the Committee recognised that there may be a need to make regulations which, in a situation of emergency, might require enactments to be superseded, it was very cautious in doing so. It noted, for example, that mechanisms already exist for the rapid adoption of legislation through the House by way of urgency.¹⁸ All the same, it considered that in exceptional circumstances, citing the example of the Executive Government needing to respond to Security Council resolutions when Parliament is not sitting, regulations may be made.¹⁹

While not given further consideration, it therefore seems that the Committee was willing to recognise that regulations made under the United Nations Act can be appropriately used to override Acts of Parliament. What seems clear, however, is that this should be limited to exceptional circumstances. While the Committee does not go on to define the scope of such circumstances, it is suggested that the position to be adopted in the current context should be to allow Government compliance with UN

¹⁸ The practical observation, however, is that this does not occur very frequently: discussion between the author and Professor John Burrows, University of Canterbury, 10 March 2005.

¹⁹ Above n 6, 20. The example of the Government being required to establish peacekeeping forces under the United Nations Act 1946, in response to measures required by the United Nations Security Council, was suggested by the New Zealand Law Society as being an appropriate emergency measure justifying Henry VIII regulation-making: see *Submissions by the New Zealand Law Society to the Regulations Review Committee in its Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments*, Parliamentary Library, Wellington, paragraph 10.

resolutions through regulations only if the resolution requires immediate action and when Parliament is not sitting. In the context of the Terrorism Regulations, these were made during the 2001 session of Parliament.

Tying this point to the potential abrogation of human rights, it is notable that a similarly restrictive view is adopted within the International Covenant on Civil and Political Rights. As discussed in Chapter Five, article 4 of the Covenant permits certain limitations upon rights and freedoms when a public emergency which threatens the life of a nation arises. A State party²⁰ cannot, however, derogate from certain specific rights and may not take discriminatory measures on a number of specified grounds.²¹ States are also under an obligation to inform other States parties immediately, through the UN Secretary-General, of the derogations it has made including the reasons for such derogations and the date on which the derogations are terminated.²² The Human Rights Committee signalled in its general comment on the application of article 4 that this is limited to states of emergency, as provided for within municipal legislation setting out grounds upon which a state of emergency may be declared.²³ It also expressed the view that measures taken under article 4 are of an

²⁰ Which includes New Zealand, as discussed within Chapter Four.

²¹ Article 4(2) of the International Covenant on Civil and Political Rights qualifies the ability to derogate by stating that “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision” — those articles relating to the right to life (article 6), freedom from torture or to cruel, inhuman or degrading treatment or punishment (article 7), the prohibition of slavery and servitude (article 8(1) and (2)), freedom from imprisonment for failure to fulfil a contract, freedom from retrospective penalties (article 15), the right to be recognised as a person before the law (article 16) and freedom of thought, conscience and religion (article 18).

²² Article 4(3) of the International Covenant on Civil and Political Rights.

²³ See *Derogation of Rights (Art. 4)*, CCPR General Comment 5 (31/07/81), para 2.

exceptional and temporary nature and can only last as long as the life of the nation concerned is threatened.

6.2.2 *Providing Additional Parliamentary Scrutiny*

Greater scrutiny by Parliament of Henry VIII regulations was something recommended by the Committee. Under current procedures, the Regulations (Disallowance) Act provides for what is known as a “negative” procedure of Parliamentary approval.²⁴ That is, regulations remain in force unless specifically disallowed by Parliament. The alternative “positive” procedure for scrutiny would provide that regulations do not come into force until first allowed by Parliament.²⁵ As recently noted by the Regulations Review Committee, this is a reasonably common (and growing feature) of the making of regulations in New Zealand.²⁶ As well as positive and negative approval procedures, a third method is used in England: the ‘super affirmative procedure’. The procedure is intended for scrutiny of regulations of an important or sensitive nature such that Parliament should consider, through a specialised Parliamentary Committee, the regulations in their draft form rather than waiting for them to be made and subsequently disallowing them.²⁷ The benefits are

²⁴ See section 6 of the Regulations (Disallowance) Act 1989 and Standing Order 382 of *New Zealand Standing Orders of the House of Representatives*.

²⁵ For further discussion on positive approval procedures, see Thornton GC, *Legislative Drafting*, (4th ed, Butterworths, 1996), 337. The only positive procedures in New Zealand are contained within: (1) the enabling provision of section 4(1) of the Misuse of Drugs Act 1975, which requires a resolution of the House approving any regulations made under that Act before they can come into force; and section 78B of the Dog Control Act 1996 (inserted by section 46 of the Dog Control Amendment Act 2003).

²⁶ Regulations Review Committee, *Interim Report on the Inquiry into the Affirmative Resolution Procedure*, NZAJHR (2004), I.16F, 3.

²⁷ For further discussion on the process, see Tudor P, “Secondary Legislation: Second Class or Crucial?”, *Statute Law Review*, Volume 21, 149.

naturally two-fold: Parliament is able to have input and control of the process prior to the regulations coming into force; and the Executive Government can be sure that important and sensitive matters are given effect to in a timely manner, without the risk of subsequent disallowance.²⁸

6.2.3 Regulations Abrogating Rights and Freedoms

In its submissions to the Regulations Review Committee, the Ministry of Foreign Affairs and Trade made the very valid point that there are significant benefits to be gained from the use of overriding treaty regulations.²⁹ It pointed to this allowing the Executive to ensure compliance with treaty obligations and avoiding wasted time by Parliament in considering technical, rather than policy, matters.

A similar approach might be adopted to the situation of international obligations under the United Nations Charter, although an important distinction needs to be made at this point. The submissions of the Ministry made a broad distinction between matters of policy and technical matters and equated bilateral treaties as being technical, versus multilateral treaties as often involving policy issues.³⁰ Where, within that scale, do obligations imposed by the UN Security Council fall? There is no absolute answer. From one perspective, resolutions of the Security Council are adopted as an exercise by the Council of its mandate under the United Nations Charter³¹

²⁸ An example of this procedure in the United Kingdom, cited within the Committee's Report, is the approval of remedial orders under the Human Rights Act 1998: above n 6, 26.

²⁹ See *Submissions by the Ministry of Foreign Affairs and Trade to the Regulations Review Committee in its Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments*, Parliamentary Library, Wellington.

³⁰ *Ibid.*

³¹ Article 24 of the Charter of the United Nations.

and are likewise binding upon States through the Charter,³² which is a multilateral treaty.³³ Adopting the Ministry's broad categorisation, such resolutions might therefore be considered as involving matters of policy. The reality, however, is that obligations imposed upon States under resolution of the Security Council are quite often very specific and technical (particularly when calling for the imposition of trade sanctions and the like). The question must therefore be addressed having regard to the substance of each particular resolution and its effect.

If the effect of UN regulations is to abrogate human rights, by impacting upon the New Zealand Bill of Rights Act, the Privacy Act, or the Human Rights Act, that is clearly a matter of policy rather than mere technicalities. Adopting the philosophy behind the Ministry's own submissions, such matters must therefore be within the influence of Parliament. Where human rights are to be affected, the ability of Parliament to carry out its role as "guardian of the public interest"³⁴ must be protected. Central to that role, as recognised by the Committee, is the protection of rights and freedoms.³⁵

This is not to suggest that non-compliance with Security Council resolutions is acceptable. Indeed, non-compliance with mandatory provisions of a resolution of the Council³⁶ would be contrary to New

³² Article 25 of the Charter of the United Nations.

³³ There are 191 States parties to the Charter of the United Nations.

³⁴ That phrase having been adopted by the Regulations Review Committee when discussing the issue of abrogation of human rights: above n 6, 16.

³⁵ *Ibid*, 17.

³⁶ That is, with mandatory directions within Security Council resolutions made under Chapter VII of the Charter of the United Nations: see discussion of the significance of mandatory, as opposed to exhortatory, language in Chapter Three, 3.3.1 *Resolutions of the Security Council*.

Zealand's obligations as a member of the United Nations.³⁷ If that occurred, the Security Council would be entitled to issue sanctions against New Zealand for its failure to comply.³⁸ The issue being addressed here concerns the manner in which such obligations are implemented by New Zealand, by whom they are implemented (the Executive alone, Parliament alone, or the Executive with Parliamentary scrutiny), having regard to the consequences of the implementing regulations (potentially abrogating human rights).

6.3 The Issue in Context: Counter-Terrorism versus Human Rights

The issue being considered here (the relationship between regulations made under the United Nations Act and human rights) is one that, unless subsequently taken up by the Regulations Review Committee, is relatively academic in nature. Discussion of the issue, to this point, has predominantly been in the abstract. It is therefore useful to place the issue in context by considering the Terrorism Regulations made in response to United Nations Security Council Resolution 1373.

6.3.1 Suppressing the Financing of Terrorism

As discussed within Chapter Two, the primary objective of Resolution 1373 is to suppress the financing of terrorist activities and entities by imposition of specific obligations to achieve those ends. In that regard, there is natural logic to the notion that combating terrorism can, at least in part, be achieved or assisted by the suppression of the financing of terrorist

³⁷ Charter of the United Nations, article 25.

³⁸ See Chapter VII of the Charter of the United Nations, articles 41 and 42 in particular.

organisations. By cutting off the monetary means of, or access to finance by, terrorist groups the ability of those groups to obtain arms and explosives and to pay for the various means by which terrorist acts can be committed will be stifled.³⁹

As also intimated within Chapter Two, of the twelve conventions on counter-terrorism, the International Convention for the Suppression of the Financing of Terrorism is possibly the most controversial. It requires States parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social or cultural goals or which also engage in such illicit activities as drug trafficking or gun running. It commits States to hold those who finance terrorism criminally, civilly or administratively liable for such acts and provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy is no justification for refusing to cooperate under the treaty.

Security Council Resolution 1373 was adopted soon after 11 September 2001, through which the Council determined that all States are to prevent and suppress the financing of terrorist acts, including the criminalisation of such financing and the freezing of funds and financial assets.⁴⁰ Described as one of the most strongly worded resolutions in the history of the Security Council,⁴¹ it also requires countries to cooperate on extradition

³⁹ See the preamble to the International Convention for the Suppression of the Financing of Terrorism, above n 2.

⁴⁰ Above n 1.

⁴¹ Richard Rowe, "Key Developments: Year of International Law in Review", A paper presented at the 10th Annual Meeting of the Australian & New Zealand Society of International Law, *New Challenges and New States: What Role for*

matters and the sharing of information about terrorist networks.⁴² As a decision made under Chapter VII of the United Nations Charter, compliance with the latter Resolution is mandatory under international law.⁴³

6.3.2 *The Terrorism Regulations*

In its first report to the Security Council Counter Terrorism Committee under paragraph 6 of the Resolution, New Zealand stated that it would be in full compliance with the Convention for the Suppression of the Financing of Terrorism once the Terrorism Suppression Bill was passed into law.⁴⁴ By way of interim measure, the Government implemented the relevant obligations by passing the Terrorism Regulations made under the United Nations Act. New Zealand reported that further legislation would be introduced to give effect to the remaining obligations under Resolution 1373, adding further provisions to the Terrorism Suppression Bill (now Act) and amending other legislation such as the Crimes Act 1961 and the Immigration Act 1987. This was eventually achieved through the Counter-Terrorism Act 2003.

International Law?, 15 June 2002, Australian National University, Canberra. Richard Rowe worked, at that time, in the International Organisations and Legal Division of the Australian Department of Foreign Affairs and Trade. He was the Australian representative and Vice-Chairman of the Ad Hoc Committee Established by General Assembly Resolution 51/210 during its Sixth Session, which followed the September 11 attacks.

⁴² Above, n 1, para 3.

⁴³ Article 25 of the Charter of the United Nations.

⁴⁴ *Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001, New Zealand*, 2 January 2002, S/2001/1269. New Zealand's subsequent report, within which it addressed various questions posed to it by the Committee, was submitted on 10 July 2002. The Bill was passed into law in 2002.

The question in context is this: were the regulations made within the terms of the empowering provision under the United Nations Act 1946? If the answer is in the negative, and it is disclosed that the New Zealand Government in fact exceeded its authority in an endeavour to present a positive report to the Security Council, then the relevant provisions of the regulations would have been *ultra vires*.⁴⁵

If, on the other hand, the regulations did no more than what is permitted by the United Nations Act, it is suggested that this is not necessarily the end of the matter. Under the Regulations (Disallowance) Act 1989, all regulations made after 19 December 1989 must be put before the House of Representatives. Under Parliamentary Standing Orders, such regulations are in fact presented to the Regulations Review Committee.⁴⁶ Aspects of the Committee's 2002 report to the House on regulation-making powers raise the issue of whether, notwithstanding the potentially proper making of the regulations in question, it was appropriate for the Executive to act in the way it did. This involves consideration of issues surrounding the treaty-making process within New Zealand, and various comments within the Committee's Report concerning the making of regulations that impact upon Acts of Parliament.

6.3.3 Examining the Terrorism Regulations

Having regard to the controversial nature of the Financing of Terrorism Convention, and the fact that New Zealand reported to the Security Council

⁴⁵ See, for example, *Official Assignee v Chief Executive Officer of the Ministry of Fisheries* (CA) [2002] 2 NZLR 722.

⁴⁶ Standing Order 382 of *New Zealand Standing Orders of the House of Representatives*.

Committee that (by way of interim measure) it implemented the financial regulation obligations through the Terrorism Regulations,⁴⁷ is there cause for concern? First, are the regulations beyond or within the statutory authority under the United Nations Act? Next, is there a conflict between the Regulations and the Bill of Rights?

As discussed, the United Nations Act empowering provision permits the Executive to make regulations in order to comply with any requirements imposed upon New Zealand by the Security Council under article 41 of the Charter of the United Nations. The Terrorism Regulations contain various provisions relating to financial regulation, creating offences where the Government is satisfied that a person has financed a terrorist group (as defined within the Schedule to the Regulations).⁴⁸ This, according to the Regulations' preamble, has been done for the purpose of giving effect to Resolution 1373.⁴⁹ If, upon examination, it was shown that the regulations were outside the terms of the empowering provision, what would the consequences be? First, it would mean that the regulations would be *ultra vires* the empowering Act.⁵⁰ Added to this would be the

⁴⁷ It should be noted, however, that the New Zealand's report does not say that the Regulations incorporated the obligations under the International Convention on the Suppression of the Financing of Terrorism. It only said that the Regulations were there to give effect to the financial regulation obligations imposed under United Nations Security Council Resolution 1373.

⁴⁸ Limited to Al-Qaida, the Taliban and Usama bin Laden: see the Schedule to the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and the Regulation's definitions of those entities within regulation 4(1).

⁴⁹ The Regulations are also stated to be made to give effect to United Nations Security Council Resolutions 1267 of 15 October 1999 and United Nations Security Council Resolution 1333 of 19 December 2000 (which specifically relate to the regulation of financial and other assistance to the Taliban regime in Afghanistan).

⁵⁰ See Robertson *Adams on Criminal Law* (Brookers Loose-Leaf), 10-30.

fact that the regulations would bypass the legislative process mandated within the House of Representatives Standing Orders.⁵¹

Upon close inspection of the Terrorism Regulations, it transpires that the regulations do not appear to offend the scope of the empowering provision, nor the Bill of Rights. The offences created by the Regulations were clearly within the scope of obligations imposed upon New Zealand through paragraph 1 of Resolution 1373:

1. *Decides* that all States shall:
 - (a) Prevent and suppress the financing of terrorist acts;
 - (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
 - (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
 - (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

The Regulations did not go as far as the Financing of Terrorism Convention goes, nor the Terrorism Suppression Act (NZ) — through

⁵¹ See Standing Orders 384 to 387 inclusive of the *New Zealand Standing Orders of the House of Representatives*, which require international treaties (that are proposed to be ratified or acceded to by the Executive Government) to be presented to the House with a “National Interest Assessment”. See also the report of the New Zealand Law Commission, *The Treaty Making Process: Reform and the Role of Parliament*, Report 45 (1995), Wellington; and a recent private member’s bill, the International Treaties Bill.

which the Convention was eventually incorporated into domestic law.⁵² Neither was the New Zealand Bill of Rights Act, nor the Privacy or Human Rights Acts, impinged upon. The offences within the Regulations were framed within the context of conduct in support of terrorist organisations where the person *knows* that s/he is doing so. This is in fact much narrower in focus than the equivalent provisions of the Terrorism Suppression Act 2002, which drew much criticism on account of the broad definition of terrorist groups and liability for *reckless* conduct within sections 8 and 9 of the Act.⁵³ The Executive acted responsibly, in the author's view, to avoid any potential natural justice⁵⁴ or rule of law⁵⁵ conflicts between the Regulations and human rights.

This is all positive news and displays a responsible approach on the part of the Executive in using regulations for counter-terrorist measures.

⁵² It could not, however, be said that New Zealand's initial report to the Security Council Counter Terrorism Committee was misleading. As discussed at note 40 above, it only said that the Regulations were there to give effect to the financial regulation obligations imposed under United Nations Security Council Resolution 1373.

⁵³ See, for example, *Submissions of the Institute of Chartered Accountants of New Zealand to the Foreign Affairs, Defence and Trade Committee on the Terrorism <Bombings and Finance> Suppression Bill*, TERRO/63, and *Submissions of the New Zealand Banker's Association to the Foreign Affairs, Defence and Trade Committee on the Terrorism <Bombings and Finance> Suppression Bill*, TERRO/133, Parliamentary Library, Wellington.

⁵⁴ A criticism that might be directed towards the Terrorism Suppression Acts designation process, through which a group is able to be categorised as being a terrorist group on the basis (potentially) of information not disclosed to the designee for national security reasons (thereby stifling the right to be heard and make a proper response), and the very limited judicial scrutiny of the process and potential recourse to the judiciary: see Chapter Seven.

⁵⁵ A criticism that might be made of the Terrorism Suppression Act's offence regime due to the broad definition of terrorist groups and the consequential inability of citizens to regulate their conduct in accordance with reasonably accessible law. The Solicitor-General's advice to the Attorney-General, however, was that the definitional provisions of the Terrorism (Bombings and Financing) Bill did not pose such a problem and guaranteed certainty: Letter from the Solicitor-General to the Attorney-General, "re Terrorism Suppression Bill: Slip Amendments – PCO 3814B/11 Our Ref: ATT114/1048 (15)", 9 November 2001, paras 6-15.

Notwithstanding this, two potential problems remain. First is the fact that the power to make “Henry VIII” regulations inconsistent with the NZBORA nevertheless *remains* with the Executive under the United Nations Act (whether exercised or not). Secondly, and this might be of more concern, is the potential for the UN Security Council to adopt a resolution with obligations upon the Executive that do, in fact, impact upon rights and freedoms. In such a situation, the New Zealand Government would be bound, by reason of article 25 of the United Nations Charter, to give effect to such directions. What then? Which obligations are to be given priority: those under the United Nations Charter or those under the International Covenant on Civil and Political Rights (as incorporated through the NZBORA)?

6.4 The Issue in Principle: How should the *United Nations Act* and *Bill of Rights Act* interact?

The foregoing discussion leads to these conclusions. Regulations made under the United Nations Act are open to “negative” procedural scrutiny by Parliament, such that they will come into force on the date nominated within the regulations unless actively disallowed by Parliament. When in force, the regulations have the *potential* to override the Bill of Rights Act, to the extent in which they might limit any right or freedom contained therein by the express provisions of the regulations. In view of the principles propounded by the Regulations Review Committee, however, one might ask (and this, in the writer’s view, is a constitutionally significant question): how *should* regulations be made under the United Nations Act, in particular to afford New Zealand citizens with protection

from unfettered Executive law-making power and/or over-zealous direction from the UN Security Council threatening the abrogation of human rights?

6.4.1 *Operative Provisions of the Bill of Rights Act*

As discussed in Chapter Four, the operative provisions of the Bill of Rights, sections 4, 5 and 6, direct how the Act is to be applied to other legislation and, thereby, how the Bill of Rights is to be used as a tool of statutory interpretation.⁵⁶

Given that regulations made under the United Nations Act are “Henry VIII” regulations, how do these operative sections apply? Two issues arise: (1) does section 6 of the NZBORA require the regulations to be made consistently with the Bill of Rights Act; and (2) does section 4 of the Bill of Rights, combined with section 2(2) of the United Nations Act, provide United Nations regulations with special protection?.

6.4.2 *Applying Section 6 of the NZBORA*

The position here is simple. By application of the general principles of statutory interpretation, one could argue that section 6 of the Bill of Rights requires subordinate legislation to be made in a manner that is consistent with the NZBORA, lest that subordinate legislation (including UN regulations) be *ultra vires* its empowering Act.⁵⁷ By virtue of section 6, wherever an enactment can be given a meaning that is consistent with the provisions of the Bill of Rights Act “that meaning shall be preferred to any other meaning”. This was the approach taken by the New Zealand Court of Appeal in *Drew v Attorney-General*, where the Court was faced with the

⁵⁶ Chapter Four, 4.3.2(a) *The unholy trinity of sections 4, 5 and 6.*

⁵⁷ Above n 41.

question of whether regulations preventing legal representation were *ultra vires* the empowering section of the Penal Institutions Act 1954 by reason of inconsistency with the New Zealand Bill of Rights Act 1990.⁵⁸

Adopting that approach, the United Nations Act empowering provision must be construed consistently with the NZBORA so that it does not confer upon its delegate the power to make subordinate legislation which infringes the Bill of Rights Act.⁵⁹

6.4.3 Applying section 4 of the NZBORA to section 2(2) of the UN Act

The next question to consider is whether section 4 of the Bill of Rights, combined with section 2(2) of the United Nations Act, provides United Nations regulations with special protection. The effect of section 4 of the NZBORA is that no provision of an enactment can be treated as invalid or ineffective if that provision is irreconcilably in conflict with the Bill of Rights.⁶⁰ Against that background, does section 4 of the Bill of Rights protect the “Henry VIII” status of regulations made under the United Nations Act?⁶¹ To answer this, a further question needs to be considered: is section 2(2) of the UN Act irreconcilably in conflict with the Bill of Rights?

⁵⁸ *Drew v Attorney-General* [2002] 1 NZLR 58: discussed in Chapter Four, 4.3.2(b) *The meaning of the terms “enactments”*.

⁵⁹ *Ibid.*

⁶⁰ Chapter Four, **

⁶¹ As provided by section 2(2) of the United Nations Act 1946.

As just discussed, section 6 of the Bill of Rights requires enactments to be interpreted in a manner that is consistent with it. How, then, is section 2(2) of the United Nations Act to be interpreted? Section 2(2) provides:

No regulation made under this Act shall be deemed to be invalid because it deals with any matter already provided for by an Act, or because of any repugnancy to any Act.

However, nowhere in the United Nations Act is there an authority to regulate in a manner inconsistent with the Bill of Rights. One possible interpretation, then, is that since such authority is not contained within the Act itself, then regulations made under the Act cannot be repugnant to the provisions of the NZBORA. This would certainly be an interpretation that is more consistent with the Bill of Rights and is therefore to be preferred by application of section 6 of the NZBORA to section 2(2) of the UN Act. On the other hand, it might be argued that the words of section 2(2) do not avail themselves of the potential interpretation proffered, since they clearly provide validity to regulations despite “any repugnancy to any Act” [emphasis added].

6.4.4 Conclusion?

By arriving at such a relatively neutral position, or at least one that is arguable either way, it is difficult to draw a positive conclusion. What the analysis illustrates, however, is the potential dichotomy between the maintenance of peace and security and that of human rights standards: the central conflict being considered within this thesis. Within the recommendations that follow, it will be proposed that this dichotomy is such that it places itself squarely within the realm of policy considerations

that should remain within the purview of Parliament and not the Executive Government alone.

6.5 Recommendations

In the absence of a specific and comprehensive review and report by the Regulations Review Committee itself, the author makes the following recommendations regarding the regulation-making power under the United Nations Act 1946:

- First, it is proposed that the issues raised within this chapter are such that a review by the New Zealand Parliament of the empowering provision under section 2 of the Act is warranted. Such review should take place within the framework of the recommendations that follow.
- Next, and following very closely in line with the Committee's Recommendation 3(3) pertaining to international treaties, Parliament should consider expressing the particular primary legislation provisions that may be overridden by United Nations regulations. Alternatively, and this links with the subsequent recommendations, the empowering provision might be amended at least to prohibit the overriding of any provision within the New Zealand Bill of Rights Act 1990, and possibly any provision of the Privacy Act 1993 and Human Rights Act 1993.

- Third, it is recommended that the regulation-making power and process should be limited to either of the following extents:
 - Empowering the making of regulations only *if* the Security Council resolution in question requires immediate action *and* Parliament is not sitting.

and/or
 - Empowering the making of regulations only *if* the Security Council resolution in question concerns a matter which threatens the life of New Zealand *and then* only by way of temporary measures.

and/or
 - Introducing a “super affirmative” Parliamentary approval procedure for the making of United Nations regulations, through which a specialised Parliamentary committee would consider the regulations in their draft form and, in doing so, reflect upon the question of what limitations those regulations might place upon the rights and freedoms guaranteed under the NZBORA and, if any such limitations are exposed, whether these are justifiable in a free and democratic society.

By adopting the latter restriction(s), Parliament would retain control over the policy aspects involved in weighing any conflict between New Zealand’s obligations under the United Nations Charter versus those under the International Covenant on Civil and Political Rights and thereby preserve its role and the protector of the public interest.

6.6 Conclusion

Although examination of the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 has not disclosed any potentially *ultra vires* provisions, consideration of the Regulations has triggered contemplation of an important issue. Namely, how the balance of power is to be attained in the situation of subordinate legislation made under the United Nations Act 1946 (in pursuit of international security measures mandated by the UN Security Council).

Regrettably, there has been little direct consideration of the issue within New Zealand. This chapter has therefore examined the issue and outlined the potential dangers that exist with the regulation-making power under the Act. First, the Executive may make regulations that are not subject to scrutiny; second, those regulations have superior status over Acts of Parliament; and third, they may be used to limit human rights with no power of recourse to the Courts. The recommendations made seek to achieve a balance between national and international security, with the desire to maintain and protect human rights and preserve the “checking” function under the separation of powers doctrine.

Chapter 7

Terrorist Designations and Rights to Justice

At the heart of the Terrorism Suppression Act 2002 is the process by which organisations or individuals can be designated “terrorist entities”. The process is governed by no less than twenty-two sections in the Act. The term “terrorist entities” is also linked to the operation of two other significant features of the Terrorism Suppression Act (TSA). Firstly, it is an offence under the Act to deal with property of terrorist or associated entities; to make property, or financial or related services available to such entities (unless authorised by the Prime Minister); to recruit any person to be a member of a designated terrorist entity; and to participate in the activities of such entities, for proscribed purposes.¹ Secondly, designations are significant since they impose reporting obligations upon those that are in possession or immediate control of property suspected to be owned or controlled by a terrorist or associated entity.²

Within Chapter Three of this thesis, the terrorist designation process was identified as one that may potentially conflict with rights to natural justice, particularly concerning access by a designated person to information upon which the Prime Minister has issued a designation, and the consequent ability of a person or organisation to respond to an

¹ Terrorism Suppression Act 2002, sections 9 to 13 inclusive: discussed in Chapter Three, 3.11.2(b) *Offences*.

² Terrorism Suppression Act 2002, sections 43 to 47 inclusive: discussed in Chapter Three, 3.11.2(e) *Financial transactions reporting*.

allegation of being a terrorist or associated entity.³ The aim of this chapter is to consider those questions. In doing so, a more detailed explanation of the designation process will be given, followed by identification of potentially conflicting provisions within the International Covenant on Civil and Political Rights (ICCPR) and the New Zealand Bill of Rights Act 1990 (NZBORA) concerning natural justice. It will then fall to be considered whether any limitation of rights is justifiable.

7.1 The Terrorist Designation Process

Internally, within the Terrorism Suppression Act, and as indicated above, the process of designations is linked with the creation of offences and with reporting obligations. Externally, the process is linked with New Zealand's obligations under the Charter of the United Nations to comply with resolutions of the Security Council and, in this particular context, the Council's designation of individuals or organisations as terrorist entities.⁴ As indicated within Chapter Three, New Zealand has currently only designated those entities identified by the Security Council.⁵

This part of the chapter is reasonably expository in nature, with the aim of clearly establishing the operation of the designation process for later analysis. It considers the making of designations, the means by which designations may be reviewed, and the treatment of classified security information.

³ Chapter Three, 3.11.4 *Potential Civil and Political Rights Issues*, and 3.14 *Potential Civil and Political Rights Issues*.

⁴ Through the Security Council Committee established pursuant to Resolution 1267 (1999) Concerning Al-Qaeda and the Taliban and Associated Individuals and Entities: discussed in Chapter Three, 3.11.2(c) *Designation of "terrorist entities"*.

⁵ Ibid.

7.1.1 The Making of Designations

Designations under the Terrorism Suppression Act, whether interim or final, have the same consequences in terms of their linkage with offences and with reporting obligations (impacting upon third parties directly, and upon designated entities as a result of the fact that dealings with them are prohibited). The designations can also impact upon designated entities by virtue of the fact that property owned or controlled by a person or group that is the subject of a final designation can be forfeited to the Crown if that property is in New Zealand.⁶ The primary difference between the two types of designation, as will be seen in the following discussion, is the standard of belief required to be had by the Prime Minister before the making of a designation, and the life of each type of designation.

7.1.1(a) Interim versus final designations. As indicated, the primary difference between interim and final designations is the level of belief required of the Prime Minister regarding the status or conduct of the person or group being designated. An interim designation can be made where the Prime Minister has “good cause to suspect” that an entity has done certain

⁶ Terrorism Suppression Act 2002, section 55: discussed in Chapter Three, 3.11.2(d) *Forfeiture of terrorist property*. Such forfeiture can only occur on application to the High Court by the Attorney-General and if the designation is one that has been extended beyond the normal three year period (under section 35 of the Act) and the Court is satisfied that it would be appropriate to forfeit the property rather than simply continue with the prohibition against dealing with it (section 9). Effectively, then, the property of a designated entity is “frozen”, in that others are prohibited from dealing with it, but cannot be forfeited unless the designation is extended beyond three years and the prohibition against dealing with the property is not sufficient.

things, while a final designation requires a belief “on reasonable grounds” to be held by the Prime Minister.⁷

There is no requirement that an entity be first designated on an interim basis before designation on a final basis. A final designation can be made in respect of a group or person that has never been the subject of an interim designation, or is at that time the subject of an interim designation, or was the subject of an interim designation that subsequently expired or was revoked.⁸ If, however, a final designation is made in respect of an entity that is already the subject of an interim designation, the latter becomes revoked as a result of the making of the final designation.⁹ In the case of an entity that has already been the subject of a final designation, and where that designation was revoked, a further final designation is permitted, but only if this is based on information that became available since the revocation of the earlier designation.¹⁰

7.1.1(b) Expiry of designations. A direct reflection of the differing standards required for interim versus final designations is found in the length of time that each type of designation can remain in force. In the case of interim designations, requiring the lower standard of proof of “good cause to suspect”, the designation can last only up to 30 days,¹¹ unless earlier revoked¹² or replaced by a final designation.¹³ Importantly, a person

⁷ Compare Terrorism Suppression Act 2002, section 22(1) and (3) (final designations) with section 20(1) and (3) (interim designations).

⁸ Terrorism Suppression Act 2002, section 23(a).

⁹ Terrorism Suppression Act 2002, section 23(b).

¹⁰ Terrorism Suppression Act 2002, section 23(c).

¹¹ Terrorism Suppression Act 2002, section 21(e).

¹² The Prime Minister has the authority, under section 34 of the Terrorism Suppression Act 2002, to revoke interim or final designations.

or organisation cannot be made the subject of repeated interim designations in an attempt to extend a designation under this lower threshold.¹⁴ The only exception to this rule is that an interim designation will continue if it becomes the subject of judicial review or other proceedings before a court (and is not otherwise revoked)¹⁵ until those proceedings are withdrawn or finally determined.¹⁶

In contrast, final designations currently last for three years from the date they are made, unless earlier revoked.¹⁷ As in the case of interim designations, if the final designation becomes the subject of judicial proceedings, that designation continues to operate, even beyond the three year period.¹⁸ Otherwise, for a final designation to continue beyond three years, it must be extended for a further period of three years by an order of the High Court.¹⁹ To do so, the Attorney-General must satisfy the Court, on the balance of probabilities, that the entity is the subject of criminal proceedings for terrorist acts,²⁰ or has been convicted of terrorist acts in an

¹³ Terrorism Suppression Act 2002, section 22: see discussion below at 7.1.2 *Final Designations*.

¹⁴ Terrorism Suppression Act 2002, section 21(a).

¹⁵ The designation could be earlier revoked under section 23(b) of 34 of the Terrorism Suppression Act 2002.

¹⁶ Terrorism Suppression Act 2002, section 21(f).

¹⁷ Terrorism Suppression Act 2002, sections 23(g)(i) and 34. The Terrorism (Bombings and Financing) Bill had provided that designations remain active for five years: see clause 17V of the Bill, as contained within the select committee's interim report – Foreign Affairs, Defence and Trade Select Committee, *Interim Report on the Terrorism (Bombings and Financing) Bill*, 8 November 2001. In its final report on the Bill, the Committee recommended that this be reduced to three years, stating that “it is important that the designation of a person or group as a terrorist or associated entity expire, so designations do not continue after the reasons for making them cease to exist”: see Foreign Affairs, Defence and Trade Committee, *Final Report on the Terrorism <(Bombings and Financing)> Suppression Bill*, 22 March 2002.

¹⁸ Terrorism Suppression Act 2002, section 23(h).

¹⁹ Terrorism Suppression Act 2002, sections 23(g)(ii) and 35(2).

²⁰ Whether in New Zealand or overseas: see Terrorism Suppression Act 2002, section 37(a).

overseas tribunal (on a final basis),²¹ or is a terrorist or associated entity.²² This can be done on a repeated basis.²³ A decision of the High Court on an application for the extension of a designation can be appealed to the Court of Appeal by any party to that application.²⁴

The Terrorism Suppression Amendment Bill (No 2) 2004 looks to extend the life of final designations beyond the current three years.²⁵ In explaining the proposed amendment, it is necessary to provide some background on two matters. First, and as discussed within Chapter Three, the Terrorism Suppression Act contains a review mechanism, whereby a parliamentary select committee is to consider the operation of the provisions of the Act pertaining to Security Council Resolution 1373.²⁶ The select committee is to report to the House by 1 December 2005 on the findings of its review, including whether any amendments to the Act are recommended.²⁷ The second matter concerns the status of current designations under the Act. The current three-year life of final designations, means that the 318 entities listed by the Security Council and designated under the Act as terrorist or associated entities will expire in October 2005.²⁸ Coupled with the requirement to obtain extensions by the

²¹ That is, convicted in criminal proceedings that are not subject to any appeal and that are finally determined: see Terrorism Suppression Act 2002, section 23(b).

²² Terrorism Suppression Act 2002, section 35(c) and (d). Compare these tests to their equivalents for interim and final designations under sections 20 and 22.

²³ Terrorism Suppression Act 2002, section 35(2) to (5).

²⁴ Terrorism Suppression Act 2002, section 41.

²⁵ Chapter Three, 3.11.2(c) *Designation of "terrorist entities"*,

²⁶ Chapter Three, 3.11.3 *Review Mechanism*.

²⁷ Terrorism Suppression Act 2002, section 70.

²⁸ Press Release, 'Amendments to Tighten Terrorism Suppression Act', URL <<http://www.behive.govt.nz/ViewDocument.cfm?DocumentID=21825>> at 8 January 2005. See also Ministry of Justice, *Terrorism Suppression Amendment Bill (No 2)*, *Government Bill, 242-1, Explanatory Note*, presented to the House 14 December 2004, 2.

High Court, Minister of Justice Phil Goff has said that it would be impossible for each designation to be renewed individually.²⁹

These two factors (the forthcoming committee review and the need to renew hundreds of designations before the High Court) prompted the Government to establish a temporary statutory extension of those designations. In this regard, the aim of the Terrorism Suppression Amendment Bill is to extend current designations so that they do not expire until two years after the presentation of the committee's report on the review of the Terrorism Suppression Act.³⁰ This seems entirely sensible, since the select committee will no doubt give consideration to the designation process and the methods of review and extension. The committee may, as a result of that process, recommend amendments to this feature of the designation process. Indeed, the Ministry of Justice appears to anticipate that a new procedure for renewal of designations will emerge as a result of the select committee review. In its General Policy Statement on the Bill, explaining the need to delay the renewal process, it said that "it is desirable that the same procedure apply to all applications for renewal under the Act", and continued:³¹

This Bill therefore provides for an extension of the designations for 2 years after the date on which the select committee reports to Parliament. This timeframe will enable the select committee to complete its consideration and report, and for any resulting changes to the legislation to be implemented.

²⁹ Ibid.

³⁰ Terrorism Suppression Amendment Bill (No 2) 2004, clause 6.

³¹ New Zealand Ministry of Justice, *Terrorism Suppression Amendment Bill (No 2)*, Government Bill, 242-1, *Explanatory Note*, presented to the House 14 December 2005, 2.

7.1.1(c) Terrorist entities and associated entities. A further distinction to be made, although one applicable to both interim and final designations, is the ‘class’ of designations that can be made. A person or group can be designated as either a “terrorist entity” or an “associated entity”, the distinction essentially depending upon that person’s or group’s past conduct. Where the Prime Minister has good cause to suspect (interim designation) or believes on reasonable grounds (final designation) that an entity “has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts”, then that entity can be designated as a terrorist entity.³² Associated entities can be designated where there is suspicion or belief that an entity is facilitating or participating in the execution of a terrorist act, or is acting on behalf of or at the direction of a terrorist entity, or is wholly owned or effectively controlled by a terrorist entity.³³ In the case of final designations, the Prime Minister can later change the description of the designation from “terrorist entity” to “associated entity” (or vice versa) by signing a written notice to that effect.³⁴

7.1.1(d) Political consultation. Before making interim designations of either terrorist or associated entities, the Prime Minister must consult with the Minister of Foreign Affairs and Trade.³⁵ The Prime Minister and

³² Terrorism Suppression Act 2002, sections 20(1) (interim designation as a terrorist entity) and 22(1) (final designation as a terrorist entity). Note that the term “terrorist acts” is defined through sections 4 and 5 of the Act: see Chapter Three, 3.11.2(a) *Definition of “terrorist act”*.

³³ Terrorism Suppression Act 2002, sections 20(3) (interim designation as an association entity) and 22(3) (final designation as an association entity).

³⁴ Terrorism Suppression Act 2002, section 29A, as inserted through the Counter-Terrorism Act 2003, section 14.

³⁵ Terrorism Suppression Act 2002, section 20(4).

Attorney-General must also advise the Leader of the Opposition of the making of a designation and, if requested, brief the Leader on the factual basis for the making of the designation.³⁶ If practicable, this must be done before the designation is publicly notified, or as soon as possible after the notification. In the case of final designations, the Prime Minister must first consult with the Attorney-General about any proposed final designation, rather than the Minister of Foreign Affairs and Trade.³⁷ Advice to the Leader of the Opposition is not prescribed.³⁸ Finally, the Prime Minister is bound to consult with the Attorney-General before deciding on whether to continue or revoke a designation, where the Prime Minister is requested under section 34(1) of the Act to reconsider the designation.

7.1.1(e) Material on which designations may be based. In making either an interim or final designation, the Prime Minister can rely on “any relevant information”.³⁹ Two categories of information, however, are accorded special status. The first is information provided by the United Nations Security Council, which is deemed by section 31(1) of the Act to be sufficient evidence of the matters to which it relates, in the absence of any evidence to the contrary. Where such information indicates that the Security Council, or one of its Committees, considers that an entity is one

³⁶ Terrorism Suppression Act 2002, section 20(5).

³⁷ Terrorism Suppression Act 2002, section 22(4). Compare this with interim designations, which require the Prime Minister to consult with the Minister of Foreign Affairs and Trade: section 20(4) of the Act.

³⁸ Compare with the need to advise and brief in the case of interim designations: Terrorism Suppression Act 2002, section 20(5).

³⁹ Terrorism Suppression Act 2002, section 30.

that would otherwise satisfy the municipal tests for cause to designate,⁴⁰ then the Prime Minister may make a corresponding municipal designation.⁴¹ Indeed, the Prime Minister may be obliged to do so to enable New Zealand to comply with article 25 of the UN Charter, depending on the source and language of the information.⁴²

The second category of information dealt with under the Act is classified security information, being information held by the New Zealand police or an intelligence and security agency, where the head of the agency has certified that the information cannot be disclosed.⁴³ To be able to give such a certificate, the head of the agency must be of the opinion that the information is of a certain nature (as specified in section 32(2)), the disclosure of which would have certain prejudicial effects (as listed in section 32(3)).⁴⁴ The treatment of classified security information is considered further below.⁴⁵

7.1.1(f) Notice of designations. The designation itself must be made in writing and signed by the Prime Minister, then publicly notified in the Gazette as soon as practicable, and by any other means directed by the Prime Minister (by internet, for example).⁴⁶ Where a designated entity, or

⁴⁰ Cause to make an interim designation is, as discussed, governed by section 20(1) and (3) of the Terrorism Suppression Act 2002. Cause to make a final designation is governed by 22(1) and (3) of the Act.

⁴¹ Terrorism Suppression Act 2002, section 31(2).

⁴² For example, if the Security Council required members of the United Nations to do so under a resolution of the Council adopted under Chapter VII of the Charter of the United Nations.

⁴³ Terrorism Suppression Act 2002, sections 4(1) and 32(1).

⁴⁴ Terrorism Suppression Act 2002, section 32.

⁴⁵ Discussed below at 7.1.3 *Classified Security Information*.

⁴⁶ Terrorism Suppression Act 2002, sections 21(b) and (c), 22(d) and (e), and 28(1). The example of notification by internet was given by the Foreign Affairs, Defence and Trade Committee in its interim report on the Terrorism Suppression

any representative of it, is in New Zealand, and if practicable, notice of the designation must also be given to the entity or representative with all reasonable speed.⁴⁷ The content of any notice of interim or final designation is prescribed by section 26:

A notice under section 21(d)(i) or section 23(f)(i) (to notify the designated entity of the making of the designation under section 20 or section 22) –

- (a) must state the section under which the designation is made, and whether the entity concerned is designated as a terrorist entity or as an associated entity;
- (b) may describe the entity concerned by reference to any name or names or associates or other details by which the entity may be identified;
- (c) must state the maximum period for which the designation may have effect or, if it is made under section 22, the maximum period for which it may have effect without being extended;
- (d) must include general information about how it may be reviewed and revoked;
- (e) must include any other information specified for the purposes of this paragraph by regulations made under this Act

A notable omission from this prescription of what must be included within a notice is the need to provide reasons for the designation. This is a point that is further reflected upon later in this chapter.⁴⁸

The Prime Minister can also direct that notice be given to any person that may be in possession of property owned or controlled by the entity, or who may be in a position to provide property or services to the entity.⁴⁹ This will normally involve notice being given to registered banks or other financial institutions so that they are in a position to comply with their

Bill, *Interim Report on the Terrorism (Bombings and Financing) Bill*, 8 November 2001, unnumbered page 9. The content of such notices is prescribed by section 27 of the Act.

⁴⁷ Terrorism Suppression Act 2002, sections 21(d)(i) (notice of interim designation) and 23(1)(f) (notice of final designation).

⁴⁸ See 7.2 The Designation Process and Natural Justice.

⁴⁹ Terrorism Suppression Act 2002, sections 9(1), 10(1), 21(d)(ii), 23(f)(ii) and 28(2). The content of such notices is prescribed by section 27 of the Act.

reporting obligations under the Act.⁵⁰ Just as designations must be notified under the Act, so must the revocation, expiry or invalidity of designations.⁵¹

An important feature of the notice provisions is that the Act specifically provides that a designation will not be invalid because the entity concerned was not given notice that a designation might be made, or given a chance to comment on whether it should be made.⁵²

7.1.2 Review of Designations

Once a designation is made, there are three means by which the designation can be reviewed. The first has already been mentioned, involving the need for the Attorney-General to satisfy the High Court of the need to continue a final designation beyond the standard three-year period.⁵³ The other two means of reviewing the status of designations involve reviews initiated either by the designated entity or reconsideration of the designation at the Prime Minister's own volition.

7.1.2(a) Reviews initiated by a designated entity or interested party. The first available option mentioned in the Terrorism Suppression Act open to a designated entity is that of judicial review. Indeed, section 33 of the Act is unrestricted in its terms, allowing "a person" (presumably any person) to bring any judicial review or other proceedings before a court arising out of, or related to, the making of a designation under the Act.

⁵⁰ See sections 43 to 47 of the Terrorism Suppression Act 2002.

⁵¹ Terrorism Suppression Act 2002, section 42.

⁵² Terrorism Suppression Act, section 29(a).

⁵³ Terrorism Suppression Act 2002, section 35: see above discussion at 7.1.1(b) *Expiry of designations*.

A designated person, or a third party with “an interest in the designation”,⁵⁴ may also apply in writing to the Prime Minister to revoke a designation.⁵⁵ In doing so, the application must be based on one of two grounds: (1) that the designation should be revoked because the entity concerned does not satisfy the prescribed requirements for designation; or (2) that the entity is no longer involved in any conduct that would otherwise legitimate a designation under the Act.⁵⁶ In determining such an application, the Prime Minister is required to consult with the Attorney-General.⁵⁷

7.1.2(b) Government review of designations. The ability to revoke a designation under section 34 of the Act can also be initiated at the Prime Minister’s own initiative.⁵⁸ This, however, is the only mechanism by which an ‘internal’ review of designations can be initiated.

In the form presented within the select committee’s interim report on the Bill, the Terrorism Suppression Act was also to include a mandatory review of designations by the Inspector-General of Intelligence and Security. The Inspector-General is a former Judge of the High Court, appointed by the Governor-General, and primarily tasked with monitoring the conduct of New Zealand’s intelligence security agencies.⁵⁹ As the Bill was first redrafted when the designation process was introduced, clause 17N provided that the Inspector-General was to review every interim and

⁵⁴ As defined by section 34(2) of the Terrorism Suppression Act 2002.

⁵⁵ Terrorism Suppression Act 2002, section 34(1).

⁵⁶ Terrorism Suppression Act 2002, section 34(3).

⁵⁷ Terrorism Suppression Act 2002, section 34(5).

⁵⁸ Terrorism Suppression Act 2002, section 34(1).

⁵⁹ Inspector-General of Intelligence and Security Act 1996, sections 5 and 11.

final designation after being served with the designations.⁶⁰ The mandatory review by the Inspector-General required him or her to determine whether the designation should stand by applying the designation test in light of the information available to the Prime Minister and any additional information available to the Inspector-General.⁶¹

The Bill was also to allow a designated entity to apply to be heard by the Inspector-General.⁶² Although the application to be heard was to be at the discretion of the Inspector-General, certain rights flowed from being granted a hearing. The entity could be represented by counsel, or a nominee; could make written submissions; and would have been entitled to receive any personal information,⁶³ except classified security information.⁶⁴

Instead of the automatic review by the Inspector-General, the select committee successfully recommended replacing this with the ability to apply for judicial review of decisions to designate.⁶⁵ It did so on the basis of receiving submissions that adversely commented upon the review of designations by the Solicitor-General alone. As summarised in the departmental report on submissions, the Solicitor-General's review process was seen by submitters as limited, with most relevant submissions

⁶⁰ See the Bill as contained within the Foreign Affairs, Defence and Trade report, *Interim Report on the Terrorism (Bombings and Financing) Bill*, 8 November 2001.

⁶¹ Terrorism (Bombings and Financing) Bill, clause 17P(2).

⁶² Terrorism (Bombings and Financing) Bill, clause 17N(2). A designated entity could only do so, however, where it had already applied to the Prime Minister for the Prime Minister to revoke the designation (and where no such revocation occurred).

⁶³ As defined within the Privacy Act 1993: see clause 17R(1)(b) of the Terrorism (Bombings and Financing) Bill.

⁶⁴ Terrorism (Bombings and Financing) Bill, clause 17R.

⁶⁵ Foreign Affairs, Defence and Trade Committee, *Final Report on the Terrorism <(Bombings and Financing)> Suppression Bill*, 22 March 2002, 11.

proposing that judicial courts should be the forum for the reviews of and appeals against terrorist designations.⁶⁶

7.1.3 Classified Security Information

As indicated within the consideration of the making of designations, the information upon which a designation is based (or part of it) can be certified by the agency providing the information to the Prime Minister as “classified security information”.⁶⁷ This will be the case where the head of the agency certifies in writing that they are of the opinion that:⁶⁸

- the information is of a kind specified in section 32(2), as information that:
 - (a) might lead to the identification of, or provide details of, the source of the information, the nature, content, or scope of the information, or the nature or type of the assistance or operational methods available to the specified agency; or
 - (b) is about particular operations that have been undertaken, or are being or are proposed to be undertaken, in pursuance of any of the functions of the specified agency; or
 - (c) has been provided to the specified agency by the government of another country or by an agency of a government of another country or by an international organisation, and is information that cannot be disclosed by the specified agency because the government or agency or organisation by which the information has been provided will not consent to the disclosure.
- and
- disclosure of the information would be likely to do any of the following things listed in section 32(3):
 - (a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
 - (b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of

⁶⁶ Ministry of Foreign Affairs and Trade, *Terrorism Suppression Bill. Part 2 of the Departmental Report on Submissions*, LGL/ICL/TER/BFC, 25 February 2002, 26-27.

⁶⁷ Discussed above at 7.1.1(e) *Material on which designations may be based*.

⁶⁸ Terrorism Suppression Act 2002, section 32(1)(c).

- another country or any agency of such a government, or by any international organisation; or
- (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
- (d) to endanger the safety of any person.

Information might satisfy this test (and therefore be capable of being certified as “classified security information”) where, for example, the information is provided to New Zealand by a security agency of another State on a confidential basis (section 32(2)(c)) disclosure of that information would thereby prejudice the confidential basis upon which the information was provided (section 32(3)(b)).⁶⁹

Although the provisions of section 32 will be considered by the head of an agency in determining whether or not to issue a classified security certificate, the impact of such a certificate is not felt at the level of the making of a designation.⁷⁰ Within the current framework of the Act, the significance of such certification lies in the treatment of classified security information in judicial proceedings. Two types of judicial proceedings are relevant to the status of designations and the use of classified security

⁶⁹ Of potential comparison to this protection of sources of information is the protection of the identity of informants leading to the issuing of a search warrant under section 198 of the Summary Proceedings Act 1957. Where an accused seeks to challenge the validity of a warrant, the New Zealand Court of Appeal has held that the prosecution is entitled to withhold information which would lead to the identity of an informant: in *R v McNicol* [1995] 1 NZLR 576. The significant qualification made by the Court, however, is that a trial Judge is obliged to allow disclosure if this would help to show that an accused is innocent (a qualification not contained within the framework of the terrorist designation process).

⁷⁰ Sections 20 to 23 (concerning the making of interim and final designations) do not require such notice to be given or responses to be provided by an entity before the making of a designation. Indeed, section 29(a) specifically states that a designation will not be invalid for failure to give prior notice or provide an opportunity to be heard. Likewise, any notice given to an entity of their designation status does not require information to be given about the factual basis upon which the designation is made: see section 26 of the Act.

information. First are those proceedings before the High Court in any application by the Crown to extend a designation beyond three years.⁷¹ Next are those where a person brings judicial review or other proceedings before a Court arising out of, or relating to, the making of a designation under the Act.⁷²

7.1.3(a) Proceedings for extension of designations. In the case of Crown applications for the extension of a designation under section 35 of the TSA, the proceedings and treatment of classified information are prescribed by the Act. First of all, section 38 of the Act requires such proceedings to be heard by the most senior High Court judge or nominee(s).⁷³ Secondly, and most importantly, section 38 allows classified security information to be withheld.

On application by the Attorney-General, and where the Crown satisfies the High Court that it is desirable for the protection of classified security information, the Court must receive or hear that information in the absence of the designated entity concerned, the entity's counsel, and members of the public.⁷⁴ The Court, in such circumstances, will be in a position to hear classified evidence in support of the Crown's application to extend the designation, in a closed court situation, and without the presence of

⁷¹ Terrorism Suppression Act 2002, section 35: see discussion above, 7.1.1(b) *Expiry of designations*.

⁷² Terrorism Suppression Act 2002, section 33: see discussion above, 7.1.2(a) *Reviews initiated by a designated entity or interested party*.

⁷³ Terrorism Suppression Act 2002, section 38(3)(a). This provision currently requires proceedings under sections 35 and 55 to be heard by the Chief Justice or nominee(s). The Terrorism Suppression Amendment Bill (No 2) 2004, clause 5, proposes to amend this so that proceedings are to be heard by the "Chief High Court Judge", reflecting the fact that – since the creation of the Supreme Court in New Zealand – the Chief Justice is now effectively two levels of appeal above the High Court: see the Ministry's Explanatory Notes on the Bill, above n 28, 1-3.

⁷⁴ Terrorism Suppression Act 2002, section 38(3)(b).

opposing counsel or the respondent. Two qualifications apply to this. Firstly, classified evidence can only be heard in this way where it is desirable to do so for the protection of either all or part of the information. Secondly, the Crown is required to provide a summary of the information concerned, except to the extent that this might prejudice the interests referred to in section 32(3) – as set out above. The summary must be approved by the Court, following which a copy of that summary will be given to the entity concerned.⁷⁵ This procedure applies to any appeal to the Court of Appeal under section 41 of the Act.⁷⁶

Although not directly relevant to the designation process, it should be noted that the latter mechanisms under section 38 of the TSA also apply to applications brought by the Crown for the forfeiture of terrorist property.⁷⁷

7.1.3(b) Judicial review or other proceedings relating to designations.

Section 39 of the Terrorism Suppression Act directs itself to the treatment of classified security information in the situation where the Crown is the respondent to proceedings, rather than the applicant. In such cases, the matter must again be heard by the senior High Court judge or nominee(s)⁷⁸ and the Court must also hear security information in the absence of the entity or counsel where the Court is satisfied that this is desirable for the

⁷⁵ Terrorism Suppression Act 2002, section 38(4)(b).

⁷⁶ Terrorism Suppression Act 2002, sections 38(5) and 41(2).

⁷⁷ Terrorism Suppression Act 2002, section 55. Such an application can only be brought by the Attorney-General once a designation has been extended beyond the normal three-year period (under section 35 of the Act) and if the Court is satisfied that forfeiture should be made, rather than simply continuing the prohibition against dealing with the property (under section 9). In other words, forfeiture cannot occur during the first three-year term of a designation.

⁷⁸ Terrorism Suppression Act 2002, sections 38(3)(a) and 39(3).

protection of the information.⁷⁹ In this case, however, the Crown is not obliged to provide a summary of the classified security information.⁸⁰

Again, it seems that this mechanism applies to any appeal against a decision on whether or not to extend a terrorist designation.⁸¹ The point to first make is that there is no provision specifically stating that any appeal against a decision on an application under section 33 (judicial review) must be subject to section 39. It might be argued, by implication, that since section 41 expresses that appeals against section 35 decisions (extensions) must be subject to section 38, then no such restriction applies to appeals against section 33 decisions. The author concludes, however, that although this restriction is not expressed in specific terms, as is done in section 41, it is implicit in the wording of section 39 itself. Firstly, subsection (1) to section 39 starts by saying that “this section applies to any proceedings in a court...” [emphasis added]. Next, subsection (3) - which establishes the protection of classified security information for section 33 proceedings - provides, in the final sentence:

However, if the proceedings are before the Court of Appeal, section 38(3)(a) does not apply.

Section 38(3)(a) relates to the appointment of the Chief High Court Judge to hear matters and clearly cannot therefore apply to any proceedings on appeal against decisions of the High Court. By mentioning section 38 (which establishes the mechanisms for the protection of classified security

⁷⁹ Terrorism Suppression Act 2002, sections 38(3)(b), and 39(3) and (4).

⁸⁰ Terrorism Suppression Act 2002, section 39(3). Compare with the requirement to do so in the case of extensions of a designation: section 38(4) of the Act.

⁸¹ That being a decision under section 35 of the Terrorism Suppression Act 2002. Section 41 of the Act does not specify the permissible grounds of appeal, simply stating that “a party to an application under section 35 may appeal to the Court of Appeal against the decision of the High Court”.

information), however, it is clearly implicit that the balance of the protective mechanisms do apply to appeals against section 33 decisions of the High Court.

7.1.3(c) The Supreme Court. A small point to note is that neither sections 39, nor 41, make mention of appeals to the Supreme Court, since the Terrorism Suppression Act was enacted prior to the establishment of the Supreme Court. Two questions therefore arise. The first is whether there can be a further appeal to the Supreme Court against a decision of the Court of Appeal concerning either extension or review proceedings. Section 7 of the Supreme Court Act 2003 answers the point very clearly in the affirmative:

The Supreme Court can hear and determine an appeal by a party to a civil proceeding in the Court of Appeal against any decision made in the proceeding, unless -

- (a) an enactment other than this Act makes provision to the effect that there is no right of appeal against the decision; or
- (b) the decision is a refusal to give leave or special leave to appeal to the Court of Appeal.

If the Supreme Court was to give leave to hear an appeal against a section 33 or 35 decision of the Court of Appeal,⁸² the second issue is whether it would be restricted by the section 38 and 39 protections of classified security information. The answer is unclear and, not going to the heart of this thesis, will not be explored in any detail. Suffice it to say that the matter is open to interpretation and seems to arise only because the

⁸² Appeals to the Supreme Court can only heard by leave of the Court: see Supreme Court Act 2003, section 12.

Supreme Court was established after the enactment of the Terrorism Suppression Act.⁸³

7.1.3(d) The trump card. A final and important point to note about the section 38 and 39 protection of classified security information is the proviso contained within section 38(7):

Subsection (2) to (6) and section 39(3) and (4) apply despite any enactment or rule of law to the contrary.

The implications of this statutory exclusion of invalidity are significant (relevant to the operative provisions of the Bill of Rights Act) and are considered further below.⁸⁴

7.2 The Designation Process and Natural Justice

As seen through the preceding overview of the designation process and matters pertaining to it, this is a reasonably complex interaction of mechanisms, and review and appeal procedures.⁸⁵ Summarising the important features of the process, there are two types of designation (terrorist entity or associated entity), distinguished by the level of current and prior involvement in terrorist conduct.⁸⁶ Applicable to both types of designation, there are two levels of designation that can be made by the

⁸³ The only apparent guidance is contained within section 11 of the Supreme Court Act 2003, which provides:

Sections 7 to 10 are subject to-

(a) the provisions of this Act; and

(b) all applicable rules, orders, and directions for regulating the terms and conditions on which appeals may be allowed, made or given under this Act or the Judicature Act 1908.

⁸⁴ Discussed below at 7.3.2(c) *Status of classified security information*.

⁸⁵ The designation process and related matters comprise 22 sections of the Terrorism Suppression Act 2002, most of which are reasonably lengthy in themselves.

⁸⁶ Discussed above at 7.1.1(c) *Terrorist entities and associated entities*.

Prime Minister (interim and final). Interim designations can be made where there is good cause to suspect that an entity satisfies the Act's test for what is a terrorist or associated entity,⁸⁷ whereas final designations require a belief on reasonable grounds that the test has been satisfied.⁸⁸ The different thresholds applicable have correspondingly different time limitations. Interim designations can only exist for a maximum of 30 days, and can only be made once in respect of any one entity.⁸⁹ A final designation can continue for a period of three years,⁹⁰ with the Attorney-General having the ability to extend the designation if s/he satisfies the High Court (on the balance of probabilities) that the test for designation continues to be met.⁹¹

The consequences of both interim and final designations mainly affect third parties, who are prohibited from dealing with property owned or controlled by terrorist or associated entities or from providing financial services to them.⁹² Naturally, this prohibition indirectly affects the entities themselves. Likewise, reporting obligations apply to property owned or controlled by terrorist or associated entities.⁹³ In the case of final designations that are extended by the High Court beyond the normal three

⁸⁷ The "test" under the Act is set out within the discussion concerning terrorist and associated entities, *ibid.*

⁸⁸ Discussed above at 7.1.1(a) *Interim versus final designations.*

⁸⁹ Discussed above at 7.1.1(b) *Expiry of designations.*

⁹⁰ Assuming that there are no judicial proceedings that might prolong that period: see section 23(h) of the Terrorism Suppression Act, as discussed above at 7.1.1(b) *Expiry of designations.* Note that this three year period does not take into account the temporary extension of final designations proposed under the Terrorism Suppression Amendment Bill (No 2) 2004.

⁹¹ Discussed above at 7.1.1(b) *Expiry of designations.*

⁹² Discussed in Chapter Three at 3.11.2(b) *Offences.*

⁹³ Discussed in Chapter Three at 3.11.2(e) *Financial transactions reporting.*

year period, the Attorney-General can apply to have the property forfeited.⁹⁴

The writer has no particular difficulty with the latter aspects of the terrorist designation process and its consequences. Of more concern, however, are those aspects of the process relating to the giving of notice, the rights of review and appeal, and the manner in which classified security information is dealt with under such review or appeal. In that regard, a number of features of the TSA are relevant. Firstly, the making of a designation does not contain any procedure by which the alleged terrorist or associated entity can make its case prior to being designated under section 20 or 22.⁹⁵ Secondly, once a designation is made, any notice given to a designated entity in New Zealand (or its representative in New Zealand) does not need to give reasons for the designation, whether made on an interim or final basis.⁹⁶ Next, where a designated entity requests the Prime Minister to revoke a designation, there is no corresponding right to be heard or right to receive information about the basis upon which the designation was made.⁹⁷ Fourthly, where the Attorney-General applies to extend a final designation, the High Court is required to receive any classified security information relating to the application without the presence of the designated entity (or its counsel) if that is desirable for the

⁹⁴ Discussed in Chapter Three at 3.11.2(d) *Forfeiture of terrorist property*.

⁹⁵ See section 29(a) of the Terrorism Suppression Act 2002, which prevents invalidation of a designation “just because... the entity concerned was not... given notice... or a chance to comment...”: discussed above at 7.1.1(f) *Notice of designations*.

⁹⁶ Discussed above at 7.1.1(f) *Notice of designations*.

⁹⁷ Discussed above at 7.1.2(a) *Reviews initiated by a designated entity or interested party*.

protection of the information.⁹⁸ Having said that, the Attorney-General is obliged to provide a summary of the information to the designated entity, except to the extent that this would involve disclosure of information that would prejudice those interests listed in section 32(3) of the Act.⁹⁹ Next, any appeal against a decision of the High Court to extend a designation restricts (in the way just mentioned) the appeal court's dealings with classified security information.¹⁰⁰ Finally, although the Act does not prevent a person from bringing judicial review proceedings arising out of the making of a designation,¹⁰¹ the High Court is again required to receive any classified security information relating to the application without the presence of the designated entity (or its counsel) if that is desirable for the protection of the information - this time without the requirement for the Attorney-General to produce a summary of the information.¹⁰²

7.2.1 *The Issue of Natural Justice*

The issue that arises from these features of the statutory designation framework is whether it is consistent with the principles of natural justice, in particular the right of a respondent to be informed of the case against it and the corresponding right to answer the case against it. In particular, are

⁹⁸ Discussed above at 7.1.3(a) *Proceedings for extension of designations*.

⁹⁹ Discussed above at 7.1.3 *Classified Security Information*.

¹⁰⁰ Terrorism Suppression Act 2002, section 41: discussed above at 7.1.3(a) *Proceedings for extension of designations*.

¹⁰¹ Discussed above at 7.1.2(a) *Reviews initiated by a designated entity or interested party*.

¹⁰² Discussed above at 7.1.3(b) *Judicial review or other proceedings relating to designations*. The rationale behind this difference is unclear, but may be borne out of the fact that section 33 proceedings are not at the instigation of the Crown, whereas section 35 proceedings are initiated by the Attorney-General (and therefore warrant further burdens upon the Crown). Either way, the author does not see that this should make any material difference to the enjoyment of the right to natural justice.

the five situations identified in the preceding paragraph consistent with natural justice? Namely, concerning: (1) the making of a designation without hearing from the alleged terrorist or associated entity; (2) the content of a notice of designation; (3) the manner in which requests to the Prime Minister to reconsider a designation are dealt with; (4) the status of classified security information in proceedings to extend a designation (or any appeal against such proceedings); and (5) the status of classified security information in judicial review proceedings (or any appeal against such proceedings).

A sixth situation is indirectly, but very significantly, affected by the treatment of classified security information in the designation process. As discussed, one of the consequences of designations under the act is to prohibit certain dealings with terrorist or associated entities. The Terrorism Suppression Act includes four such offences: dealing with property, knowing that the property is owned or controlled by a designated entity (or derived from such property); making property, or financial or related services, to an entity, knowing that the entity is designated under the Act; recruiting a person as a member of a group, knowing that the group is a designated entity; and participating in a group, knowing that the group is a designated entity, with the aim of enhancing its ability to carry out, or participate in, a terrorist act.¹⁰³ In the context of the last-mentioned offence, the writer can see no problem, since the offence is not only linked with designation but also with an intention to facilitate terrorist acts. With the other three offences, however, the key to the offending is that the

¹⁰³ Terrorism Suppression Act 2002, sections 9(1), 10(1), 12(1) and 13: see Chapter Three, 3.11.2(b) *Offences*.

conduct is otherwise lawful (dealing with property, providing financial services, and recruiting group members) except that it is in respect of an entity that is known by the actor to be designated under the Act. What significance does this hold? The problem that arises is where a defendant might seek to challenge the validity of the designation. To give an example:

A (a New Zealand citizen) makes a donation to B (a Muslim organisation in Auckland). B has been made the subject of a final designation as an associated terrorist entity (the Prime Minister concluding under section 22(3)(b)(i) of the TSA, on receiving classified security information, that B [the associated entity] is acting on behalf of C to denounce the action of the United States military in Afghanistan). C is an organisation in Afghanistan, designated under Security Council Resolution 1267 and the Terrorism Suppression Act as a terrorist entity. A [the donor] knows that B [the associated entity] has been designated as an associated terrorist entity, but claims that he and B had no knowledge that C [the terrorist entity] had carried out, or was participating in, any terrorist act. A [the donor] is charged, under section 10(1) of the Terrorism Suppression Act, with making money available to B [the associated entity], knowing that B was designated under the Act.

In that situation, A [the donor] would no doubt want to complain that B [the associated entity] had been improperly designated under the Act - i.e. that the Prime Minister was wrong in concluding that B was an associated

entity, since B knew nothing of C's involvement in any terrorist conduct, and since peaceful protest about the military conduct of the United States in Afghanistan is not unlawful. It is not difficult to imagine such a situation arising. Indeed, fear of such an outcome was the basis of a number of submissions made by the public to the select committee's hearings on the Terrorism (Bombings and Financing) Bill.¹⁰⁴ What, then, might A seek to do?

The first point to make is that A would be unable to make direct use of such an argument as a defence to criminal proceedings. A prosecutor is only required to satisfy a criminal court of the elements of an offence and would, as such, argue that the only relevant issue before the court is whether A [the donor] knew that B [the associated entity] was designated under the Act. A prosecutor would furthermore properly argue that any challenge to the validity of the designation was not an issue for the court exercising its criminal jurisdiction in that matter, but was instead a civil matter. And, indeed, the designation process is a civil one, although the status of the designation would, at the very least, be a relevant factor in sentencing.

However, notwithstanding the fact that a challenge to the validity of a designation could not act as a defence to a criminal charge, such a challenge could act to suspend the criminal proceedings. Taking the same

¹⁰⁴ See, for example, submissions by the New Zealand Council for Civil Liberties (submission number 22), the Democratic Peoples Republic of Korea Society (submission number 28), the Indonesia Human Rights Committee (submission number 36), the Canterbury Council for Civil Liberties (submission number 45), the Latina America Committee of New Zealand (submission number 88), and the Auckland Council for Civil Liberties (submission number 95). See also Smith JE, *New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities*, Ian Axford New Zealand Fellowship in Public Policy, December 2003, 61.

example: A [the donor], as a person with an interest in ascertaining the validity of the designation of B [the associated entity], could initiate proceedings under section 33 of the Terrorism Suppression Act:

33 Judicial review of designations

Nothing in this Act prevents any person from bringing any judicial review (whether under Part I of the Judicature Amendment Act 1972 or otherwise) or other proceedings before a court arising out of, or relating to, the making of a designation under this Act.

In doing so, A [the donor] would seek to have the Prime Minister's decision concerning B [the associated entity] reviewed. Specifically, section 22(3)(b)(i) (which is the basis of B's designation in this scenario) provides that the Prime Minister can designate as an associated entity a group that s/he believes on reasonable grounds:

- (b) is acting on behalf of, or at the direction of, -
 - (i) the terrorist entity, knowing that the terrorist entity has done what is referred to in sub-section (1) [emphasis added]

In that regard, sub-section (1) of section 23 refers to the designation of an entity as a terrorist one if it has knowingly carried out or participated in a terrorist act. In the example given, A [the donor] would seek to argue (on judicial review of the Prime Minister's decision) that although B [the associated entity] was denouncing the US military role in Afghanistan at the direction of C [the terrorist entity], B did not know that C had carried out or participated in a terrorist act, and that the test under section 22(3)(b)(i) was therefore not satisfied. In more simple words, A would argue that the Prime Minister had improperly concluded that B was an entity within the definition of section 22.

A point made earlier was that A would be unable to make direct use of such an argument as a defence to criminal proceedings. By challenging the validity of the designation under section 33, however, A would no doubt be able to obtain an adjournment of the criminal proceedings to await the outcome of the civil (judicial review) proceedings.¹⁰⁵ The issue of natural justice comes into play with regard to those civil proceedings, since section 39 of the Terrorism Suppression Act could require the High Court to hear the classified security information in the absence of A [the donor] or B [the associated entity]. If the classified security information was the only basis on which the designation of B was made, how is A or B to respond to the Crown's argument before the High Court that the Prime Minister's decision was proper? Thus, the issue of natural justice can also arise for a person accused of offences under sections 9, 10 or 12 of the Terrorism Suppression Act 2002.

7.2.2 Sources and Content of the Right to Natural Justice

If natural justice is an issue for the situations identified, then a number of enquiries must be made. The first, to be dealt with under this part of the chapter, is to determine what the various sources of the right to natural justice are. In doing so, it will be necessary to consider and examine the content of the right. Those two enquiries will be shown to lead to a preliminary conclusion that the situations identified conflict with the right to natural justice. Having arrived at that position, this chapter will then

¹⁰⁵ Where a defendant is proceeded against summarily, for example, the Court has an unfettered power to adjourn the hearing of any charge: Summary Proceedings Act 1957, section 45(1).

consider whether the Act's designation process can be a valid limitation upon the right to natural justice.

Addressing the first enquiry, there are three relevant "sources" of the right to natural justice (or its equivalent) for the purpose of this chapter: (1) the International Covenant on Civil and Political Rights (ICCPR); (2) the New Zealand Bill of Rights Act 1990 (NZBORA); and (3) the Terrorism Suppression Act itself.¹⁰⁶ Each is considered in further detail.

7.2.2(a) The International Covenant on Civil and Political Rights. Using the language of the ICCPR, the International Covenant guarantees to all persons the right to a fair hearing.¹⁰⁷

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

As can be seen, the provision contains exceptions to the right, which will be considered later in this chapter.¹⁰⁸ At this stage, this examination is concerned with determining the broad content of the right to a fair hearing,

¹⁰⁶ The right, it should be acknowledged, is also a common law one (see *Drew v Attorney-General* [2002] 1 NZLR 58). For consideration of the interaction between the common law and statute law, see Chapter Nine concerning the privilege against self-incrimination (at 9.1.3 *Self-Incrimination and the Common Law*).

¹⁰⁷ Note that the balance of article 14 is limited in its application to criminal proceedings.

¹⁰⁸ See 7.3 The Designation Process as a Limitation upon Natural Justice.

which has been recognised by the Human Rights Committee as including the various rules of natural justice. The jurisprudence of the Committee has accepted that article 14(1) encompasses the principles of equality before courts and tribunals, the need for tribunals to be competent, independent and impartial and to promptly dispose of proceedings.¹⁰⁹ Specifically pertaining to the right to a fair and public hearing, the Committee has considered this to include the notion of equality of arms, the right to attend a hearing, the right to respond to a case, and the idea of open justice.¹¹⁰ The Committee has also taken the view that the right to natural justice is not dependent on the status of one of the parties (whether governmental, parastatal or an autonomous statutory entity).¹¹¹ Presumably, then, this includes decisions of a Prime Minister.

To the extent possible, an 'equality of arms'¹¹² will be an important factor in the guarantee of a fair hearing. Having said this, the Committee has been reluctant to find breach of this aspect of a fair hearing, so long as the person has been afforded an opportunity to be present, examine witnesses and be represented if that is the person's wish. In *Agudo v Spain*, for example, the author claimed that there was no verbatim record of the statements of witnesses, experts, parties and counsel but only a summary

¹⁰⁹ For a more detailed discussion of the jurisprudence of the Human Rights Committee on these points, see Conte A, Davidson S and Burchill R, *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee* (Ashgate Publishing Ltd, 2004), 117-125.

¹¹⁰ Ibid, 122-124.

¹¹¹ *YL v Canada*, Human Rights Committee Communication 547/1993, para 9.11. See also Conte, Davidson and Burchill, *ibid*, 118-119.

¹¹² This is a term used by both the United Nations Human Rights Committee and the European Court of Human Rights to represent the idea of the procedural equality of parties. See, for example, Wasek-Wiaderek M, *Principle of "Equality of Arms" in Criminal Procedure Under Article 6 of the European Convention on Human Rights & its Function in Criminal Justice of Selected European Countries* (Leuven University Press, 2000).

drawn up by the clerk of the court, so that the proceedings lacked essential guarantees. The Committee failed to see how those facts alone constituted a breach of article 14(1).¹¹³ In *Jansen-Gielen v The Netherlands*, however, the Committee found that there had been an inequality of arms. The Netherlands Central Appeals Tribunal had failed to append a psychological report (submitted by the author's counsel) to the case file two days before the hearing, in violation of her right to a fair hearing. The Netherlands argued that the Court had considered that the admission of the report two days before the hearing would have unreasonably obstructed the other party in the conduct of the case. The applicable procedural law did not, however, provide for a time limit for the submission of documents. The Committee found that it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit, to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings.¹¹⁴

The right to a fair trial in a suit at law, by being present at the hearing, is less clear than in the conduct of criminal proceedings.¹¹⁵ The Committee has commented that article 14(1) 'may' require that an individual be able to participate in person in civil proceedings. In such circumstances the State party is under an obligation to allow that individual to be present at the hearing, even if the person is a non-resident alien. In assessing whether the requirements of article 14(1) were met in *Said v Norway*, the Committee

¹¹³ *Agudo v Spain* Human Rights Committee Communication 864/1999, para 9.4.

¹¹⁴ *Jansen-Gielen v The Netherlands* Human Rights Committee Communication 846/1999, para 8.2.

¹¹⁵ In the case of criminal proceedings, the Committee has been clear about the need to ensure that an accused is tried in person and the limited restrictions to this rights that are permissible: see Conte, Davidson and Burchill, above n 109, 122-123.

noted that the author's lawyer did not request a postponement of the hearing for the purpose of enabling the author to participate in person; nor did instructions to that effect appear in the signed authorisation given to the lawyer by the author and subsequently presented by the lawyer to the judge at the hearing of a child custody case. In those circumstances, the Committee adopted the view that there was no violation by the state through any failure by the Oslo City Court to postpone the hearing, on its own initiative, until the author could be present in person.¹¹⁶ The Committee went no further to clarify *when* civil proceedings 'may' require that an individual be able to participate in person in civil proceedings. Interesting, also, is the fact that the party in *Said v Norway* was at least represented by counsel and, thereby, allowed to respond in some form to the case against him.

The case of *Hermoza v Peru* is also highly relevant to the question of the content of the right to a fair hearing.¹¹⁷ Hermoza was an ex-sergeant of the Peruvian police, Guarda Civil, and claimed to have been temporarily suspended from the force on false accusations of insulting a superior officer. When brought before a judge on the charge, he was released for lack of evidence. Notwithstanding that fact, Hermoza was discharged from service by an administrative decision in respect of which he was not permitted to make representations. The Human Rights Committee concluded that those circumstances entailed a breach of article 14(1) of the

¹¹⁶ *Said v Norway* Human Rights Committee Communication 767/1997, para 11.3.

¹¹⁷ *Hermoza v Peru*, Human Rights Committee Communication 203/1986.

Covenant.¹¹⁸ In the individual opinion of Committee members Cooray, Dimitrijevic and Lallah, the Committee members specifically expressed that the principle of *audi alteram partem* (literally meaning “hear the other side”)¹¹⁹ was part of the right to a fair hearing under the Covenant.¹²⁰

In summary, article 14(1) guarantees the right to a fair hearing in civil proceedings, which has been equated with various principles of the right to natural justice. Relevant to the enquiry in this chapter, it has been expressed to include the principle of equality of arms, the right to be present, or at least represented, at a hearing, and the ability to state one’s case in response to the case of an opposing party.

7.2.2(b) *The New Zealand Bill of Rights Act 1990 and the Terrorism Suppression Act 2002.* Section 27 of the New Zealand Bill of Rights Act protects three rights: the right to natural justice, the right to seek judicial review, and the right to bring and defend civil proceedings against the Crown on an equal basis.¹²¹ As already seen through the expository review of the designation process under the Terrorism Suppression Act, the right to judicial review is specifically guaranteed.¹²² Thus there are only two provisions of the Bill of Rights to be considered:

27. Right to Justice-

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights, obligations, or interests protected or recognised by law.

¹¹⁸ Ibid, para 12.

¹¹⁹ Joseph PA, *Constitutional and Administrative Law in New Zealand*, (2nd ed, Brookers, 2001), 860.

¹²⁰ Above n 116, para 4.

¹²¹ As summarised in Rishworth P, Huscroft G, Optican S and Mahoney R, *The New Zealand Bill of Rights* (Oxford University Press, 2003), 753.

¹²² Terrorism Suppression Act 2002, section 33: discussed above at 7.1.3(b) *Judicial review or other proceedings relating to designations.*

- (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Before considering the content of these provisions, it is important to note that, in the Solicitor-General's review of the first draft of the Terrorism (Bombings and Financing) Bill, he advised the Attorney-General that:¹²³

In my view, the process of designation is consistent with BORA and, in particular, s 27(1) thereof.

Regrettably, the Solicitor-General gave no reasons for arriving at that conclusion within his letter of advice. While that advice seems out of step with the discussion that follows, it should be noted that the Solicitor-General was advising on the first redraft of the Bill, which included the Inspector-General of Security and Intelligence being involved in the designation and review process.¹²⁴

The right to natural justice (subsection (1)) contains two main components: *audi alteram partem*, the duty to hear both sides of a matter before making a decision; and *nemo iudex in sua causa*, the notion that no one should be a judge in his or her own cause.¹²⁵ It is the first component that is of relevance to this chapter. Of particular relevance, the duty to hear both sides *can* include the giving of prior notice, the disclosure of relevant

¹²³ Letter from the Solicitor-General to the Attorney-General, "re Terrorism Suppression Bill: Slip Amendments – PCO 3814B/11 Our Ref: ATT114/1048 (15)", 9 November 2001, para 20.

¹²⁴ As will be discussed later, that role is seen by the author as central to achieving a justifiable balance between the needs of the designation process and the right to natural justice: see below at 7.4.2 *Reinstatement of the Inspector-General's Review*.

¹²⁵ Rishworth, Huscroft, Optican and Mahoney, above n 121, 754.

material, the receipt of (written or oral) submissions, representation by counsel, and the giving of reasons for the decision-maker's finding.¹²⁶

The first point to note is that the right to natural justice differs in its content as between administrative versus judicial decision-makers. Professor Joseph summarises the point that natural justice does not include a right to a hearing before an administrative decision-maker, but merely a right to tender written submissions, whereas parties have an unqualified right to be heard orally before the courts.¹²⁷ Where a hearing is granted, prior notice of the hearing is seen as inherent to the right to be heard.¹²⁸ In being heard, however, natural justice does not recognise any general right to be represented by legal counsel.¹²⁹ What it does recognise, however, is that an administrative tribunal has the discretion to permit representation, which must be exercised fairly, and be based on a number of factors identified in *R v Secretary of State for the Home Department; ex parte Tarrant*: the seriousness of the allegation and of any potential penalty, whether points of law are to arise, the ability of the person to present the case, the potential for procedural difficulties, the desirability for the prompt disposal of proceedings and the need for an equality of arms.¹³⁰

Two features of the right to natural justice are particularly important to this chapter: the disclosure of relevant material; and the giving of reasons for a decision-maker's finding. Central to the *audi alteram partem* rule is the right to hear the nature and basis of the case, thereby allowing

¹²⁶ Joseph, above n 119, 860-874.

¹²⁷ Ibid, 864.

¹²⁸ Ibid, 860-861.

¹²⁹ Ibid, 864-866.

¹³⁰ *R v Secretary of State for the Home Department; ex parte Tarrant* [1985] 1 QB 251.

interested parties to respond to the case and, if appropriate, contest or seek to correct the information in issue. In *Daganayasi v Minister of Immigration*, the New Zealand Court of Appeal quashed the Minister's refusal to revoke a deportation order, since the Minister's decision had been based upon a medical report that had not been disclosed to the applicant.¹³¹ Where disclosure is made, it must be in a way that affords a person a proper opportunity to consider the material and be thus put in a position to respond. The production of a detailed report at the time of hearing has been held, for example, to be a breach of natural justice by failing to give a person an opportunity to assess the report and make submissions on it.¹³² Where disclosure is made by way of a summary of information, the summary must disclose what Professor Joseph refers to as a "sufficient account" of the information to make the right to respond a meaningful one.¹³³

The second important aspect of the right to natural justice is the desirability that a decision-maker will give reasons for its decision. Ultimately, however, there is no obligation at law to give reasons, which "places the law out of step with public expectations of transparency and accountability in decision-making".¹³⁴ Notwithstanding this, Chief Justice Davison, in *Potter v New Zealand Milk Board*, described it as a public

¹³¹ *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130.

¹³² *Mockford v New Zealand Milk Board* unreported, 14/10/81, Roper J, HC Dunedin.

¹³³ Joseph, above n 119, 862.

¹³⁴ *Ibid*, 871.

responsibility of both courts and administrative authorities to provide reasons:¹³⁵

The giving of reasons helps to concentrate the mind of the tribunal upon the issues for determination: it enables litigants to see that their cases have been carefully considered and the arguments understood and appreciated; it enables a litigant dissatisfied with a decision to more readily consider whether there are grounds of appeal; and it enables an appellate Court or tribunal to ascertain the determinations of the tribunal on questions of fact, to which the appellate Courts pay deference on the hearing of an appeal and [it] also enables the appellate Court... to know what principles of law have been applied and to consider whether such were correct.

The right to bring and defend proceedings against the Crown (section 27(3) of the NZBORA) is described as being grounded in Dicey's idea of equality and as comprising two components: the right to bring and defend proceedings; and the right that those proceedings be dealt with on the same basis as if the Crown was not a party.¹³⁶ In principle, the first component is not affected by the designation process since the Terrorism Suppression Act envisages in its terms that proceedings concerning designations can be both defended and brought against the Crown.¹³⁷ The latter component is of particular relevance, and mirrors the concept of equality of arms discussed above.¹³⁸ As noted in the White Paper on the New Zealand Bill of Rights:¹³⁹

The individual should be able to bring legal proceedings against the Government, and more generally to engage in civil litigation with it, without the Government enjoying any procedural or jurisdictional privileges.

¹³⁵ *Potter v New Zealand Milk Board* [1983] NZLR 620, 624.

¹³⁶ Rishworth, Huscroft, Optican and Mahoney, above n 121, 767.

¹³⁷ Terrorism Suppression Act 2002, section 33, 35, 39 and 41.

¹³⁸ Discussed at 7.2.2(a) *The International Covenant on Civil and Political Rights*.

¹³⁹ New Zealand Department of Justice, *A Bill of Rights for New Zealand* (1985) AJHR A6, para 10.177.

7.2.3 Preliminary Conclusion

The above analysis can easily lead to the preliminary conclusion that there is an apparent, or *prima facie*, conflict between the various components of the right to natural justice and the Terrorism Suppression Act, sections 20 and 22 (the making of designations), 26 (notice), 34 (reconsideration by the Prime Minister on application of the entity), 38 and 41 (treatment of classified information in proceedings concerning designation extensions), and 39 (treatment of classified information in proceedings arising out of the making of a designation). In each of the five situations identified above,¹⁴⁰ these provisions have the potential effect of excluding all or most of the reasons for the making of a designation. This will be the case where the Prime Minister's decision to designate is based entirely, or largely, upon classified security information, or where the notice of designation fails to give reasons for the designation.

In such circumstances (which clearly impact upon the rights, obligations or interests of a designated or accused person), a person is being denied access to the reasons for the designation and is thereby denied the opportunity to "answer the case". In the situation of reconsiderations by the Prime Minister under section 34, the person has no right to be heard at all.

The question now becomes whether there is an actual conflict or inconsistency. To determine this, one needs to give careful consideration to a number of further issues. Are the rights concerned able to be limited within the framework of the ICCPR, and do the limitations imposed by the

¹⁴⁰ Discussed at 7.2.1 *The Issue of Natural Justice*.

Terrorism Suppression Act fit within any such permissible limitations? Similarly, are the limitations justifiable within the framework of section 5 of the Bill of Rights, and how do sections 4 and 6 affect the relationship between the limitations and the expression of the right to natural justice within the NZBORA? Next, what implications are there if the limitations are justifiable under one instrument (e.g. the Bill of Rights) but not under the other (e.g. the International Covenant)?

7.3 The Designation Process as a Limitation upon Natural Justice

7.3.1 Limiting Natural Justice under the ICCPR

The first of the questions just posed was this: are the rights concerned able to be limited within the framework of the ICCPR, and do the limitations imposed by the Terrorism Suppression Act fit within any such permissible limitations? As seen in the discussion above,¹⁴¹ article 14 of the ICCPR only permits a limitation upon the right to a fair and open trial by permitting the press and public to be excluded “from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”. The jurisprudence of the Human Rights

¹⁴¹ Discussed further above at 7.2.2(a) *The International Covenant on Civil and Political Rights*.

Committee has not extended this exception to the right. Neither the words of article 14, nor the jurisprudence of the Committee, suggest that the right to a fair hearing can be limited in the way it is under the designation process within the Terrorism Suppression Act.

As such, the earlier preliminary conclusion that the designation process is in breach of the principle of natural justice, enshrined in the ICCPR through the right to a fair hearing in article 14, must stand as a final conclusion. Although article 14(1) is not listed within article 4(2) of the Covenant – setting out rights that may not be derogated from in times of emergency – the position remains that New Zealand has not lodged a declaration of emergency under article 4. As such, it cannot claim to be derogating from the right to a fair hearing as a result of any state of terrorist emergency.

7.3.2 Limiting Natural Justice under the NZBORA

In considering the question of whether natural justice can be properly limited under the Terrorism Suppression Act within the framework of the New Zealand Bill of Rights Act, the answer does not lie in simply applying the section 5 justified limitation provision of the latter Act. Application of the Bill of Rights brings into play what has been described as the “unholy trinity” of sections 4, 5 and 6.¹⁴² Much of that is an exercise in statutory

¹⁴² That phrase having been coined by Dr James Allen in his article “The Operative Provisions - An Unholy Trinity” [1995] *Bill of Rights Bulletin* 79: as discussed in Chapter Four at 4.3.2(a) *The ‘unholy trinity’ of sections 4, 5 and 6*.

interpretation and, as such, it is important to identify the precise language of each provision that is to be examined.¹⁴³

7.3.2(a) *The making of designations.* The making of designations is done by the Prime Minister under section 20 (interim designations) or 22 (final designations). The authority of the Prime Minister is contained within subsections (1) to (3) of those sections (what has earlier in this chapter been described as the “tests” for designation):

- (1) The Prime Minister may designate an entity as a terrorist entity under this section if the Prime Minister [has good cause to suspect - *section 20(1)*] [believes on reasonable grounds - *section 22(1)*] that the entity has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts.
- (2) On or after designating an entity as a terrorist entity under this Act, the Prime Minister may designate 1 or more other entities as an associated entity under this section.
- (3) The Prime Minister may exercise the power given by subsection (2) only if the Prime Minister [has good cause to suspect - *section 20(3)*] [believes on reasonable grounds - *section 22(3)*] that the other entity-
 - (a) is knowingly facilitating the carrying out of 1 or more terrorist acts by, or with the participation of, the terrorist entity (for example, by financing those acts, in full or in part); or
 - (b) is acting on behalf of, or at the direction of,-
 - (i) the terrorist entity, knowing that the terrorist entity has done what is referred to in subsection (1); or
 - (ii) an entity designated as an associated entity under subsection (2) and paragraph (a), knowing that the associated entity is doing what is referred to in paragraph (a); or
 - (c) is an entity (other than an individual) that is wholly owned or effectively controlled, directly or indirectly, by the terrorist entity, or by an entity designated under subsection (2) and paragraph (a) or paragraph (b).

¹⁴³ These have been earlier identified as raising six situations that are inconsistent with the principles of natural justice: discussed above at 7.2.1 *The Issue of Natural Justice*.

The provision does not exclude the ability to hear from an alleged terrorist or associated entity, although the drafters of the Act clearly anticipated that there would be no such hearing, section 29 providing that:

- No designation under section 20 or section 22 is invalid just because-
- (a) the entity concerned was not, before the designation was made, given notice that it may be made, or a chance to comment on whether it should be made, or both:

Adopting the approach advocated by the New Zealand Court of Appeal in *Moonen*, the first step to be taken is to identify the different interpretations of the words contained in the provision being examined, with a view to determining the application of section 4 and 6 of the NZBORA.¹⁴⁴ One might thereby argue that, since sections 20 and 22 do not exclude the right to be heard by the Prime Minister or the right to be informed of the basis upon which the designation is being considered, then one interpretation that is open (and one most consistent with the NZBORA right to natural justice) is that the Prime Minister is obliged to hear the alleged entity and provide it with a copy of the information being considered.

However, such an interpretation would - in the author's view - produce an absurd result. Firstly, not all entities being designated will be resident in New Zealand, or even have representatives in New Zealand. Secondly, such an interpretation would not cater for the special status of classified security information, which must surely be protected (and is able to be protected, by proportionate means, in the view of the author).¹⁴⁵ The additional problem concerns the role of the Prime Minister and is one of

¹⁴⁴ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17; discussed in Chapter Four at 4.3.2(a) The 'unholy trinity' of sections 4, 5 and 6.

¹⁴⁵ See discussion below at 7.3.2(d) *Status of classified security information*.

common sense and reality. As head of State, and ultimately the effective head of security intelligence services and of the military, it is suggested that the Prime Minister cannot be expected to him/herself hear alleged terrorist or associated entities. In any event, that would not establish an independent and impartial process. In saying this, it is not suggested that the Prime Minister would fail to act in an impartial manner, but the reality is that the office of the Prime Minister is an executive rather than a judicial one. In contrast, the office of the Inspector-General of Security and Intelligence is one (in the view of the author) that does guarantee impartiality and independence.¹⁴⁶ It is suggested that, in order to achieve a proper balance between the exercise of the right to be heard and the protection of the integrity of the designation review process, reform is again necessary. The reforms advocated below seek to introduce a process by which designations are automatically reviewed by the Inspector-General of Security and Intelligence, with certain rights to be heard and be advised of the reasons for the designation.¹⁴⁷ In effect, the proposal is to re-establish the Inspector-General's review as had been proposed within the first redraft of the Terrorism (Bombings and Financing) Bill. It will be submitted, in the discussion of those reforms, that such a process, while still limiting the right to natural justice, would nevertheless be proportionate and thereby justifiable in a free and democratic society.

¹⁴⁶ While it has to be acknowledged that there have been criticisms of the Inspector-General in this regard (see Small D, "A Critique of the Terrorism Suppression Bill", available online at the ARENA website, URL <<http://www.arena.org.nz>> at 2 November 2002), the author posits that the structure of the Inspector-General of Intelligence and Security Act 1996 does guarantee (to the extent possible) the impartiality and independence of the office.

¹⁴⁷ Discussed below at 7.4.2(a) *Review of designations*.

7.3.2(b) *Notice of designations.* As to notice, section 26 of the Terrorism Suppression Act provides:

A notice under section 21(d)(i) or section 23(f)(i) (to notify the designated entity of the making of the designation under section 20 or section 22) –

- (a) must state the section under which the designation is made, and whether the entity concerned is designated as a terrorist entity or as an associated entity;
- (b) may describe the entity concerned by reference to any name or names or associates or other details by which the entity may be identified;
- (c) must state the maximum period for which the designation may have effect or, if it is made under section 22, the maximum period for which it may have effect without being extended;
- (d) must include general information about how it may be reviewed and revoked;
- (e) must include any other information specified for the purposes of this paragraph by regulations made under this Act

The provision does not exclude the ability to inform the entity of the information upon which a designation was based, nor does it require it. In attempting to identify the different interpretations of the words contained in the provision, one might argue that, since section 26 does not exclude the provision in such a notice of information upon which a designation is based, then an open interpretation of section 26 (and one most consistent with the NZBORA right to natural justice) is that notice under section must inform the entity of the information upon which the designation was based.

That is certainly an attractive argument and one that, in the author's view, is correct. There are, however, two practical problems that remain. The first is the simple fact that section 26 does not state that such information is required and that, as such, an innocent application of the section could cause notice to be given without the provision of such information. The more important problem is that, although section 26

should be interpreted as requiring information to be given, such an interpretation provides no guidance on how classified security information should be dealt with. As will be seen in the discussion that follows, the protection of classified security information is seen by the author as an important objective and an interpretation of section 26 should not, it is proposed, be such that it would require disclosure of all classified information.¹⁴⁸ The protection of classified information in the provision of information could, as argued later, be justifiable in a free and democratic society (section 5). As such, this is something that calls for reform.¹⁴⁹

7.3.2(c) *Review of designations by the Prime Minister.* Requests by an entity to have a designation reconsidered by the Prime Minister are provided for under section 34(1) of the Terrorism Suppression Act:

The Prime Minister may at any time revoke a designation made under section 20 or section 22, either on the Prime Minister's own initiative or on an application in writing for the purpose-

- (a) by the entity who is the subject of the designation; or
- (b) by a third party with an interest in the designation that, in the Prime Minister's opinion, is an interest apart from any interest in common with the public.

Again, the provision does not exclude rights (in this case, any accompanying right to be heard by the Prime Minister or to receive information about the basis upon which the designation was made), nor does it require or allow it. Again, one might therefore conclude that application of section 6 of the New Zealand Bill of Rights Act requires this provision to be interpreted in a manner that is most consistent with the right

¹⁴⁸ Discussed below at *Status of classified security information*.

¹⁴⁹ Proposals for reform of the designation process are set out later within this chapter. In the context of reforming the provision of notice of designations, see 7.4.1 *Notice of Designations*.

to natural justice, thereby requiring the Prime Minister to hear an applicant and first provide the applicant with information about the basis upon which the designation was made.

Here, there are three perceived problems with this position. As before, the first practical problem is that any right to be heard or provided with information is not expressed and might therefore lead to an inconsistent application. The second again relates to the problem of protecting classified security information, as earlier discussed.

The additional problem in the context of reviews by the Prime Minister is one of common sense and reality. As head of State, and ultimately the effective head of security intelligence services and of the military, it is suggested that the Prime Minister cannot be expected to him/herself hear a designated entity. A practical answer may lie in the delegation of this authority by the Prime Minister. In any event, and under either option, this would not establish an independent and impartial process. In saying this, it is not suggested that the Prime Minister would fail to act in an impartial manner, but the reality is that the office of the Prime Minister is an executive rather than a judicial one. In contrast, the office of the Inspector-General of Security and Intelligence is one (in the view of the author) that does guarantee impartiality and independence.¹⁵⁰ It is suggested that, in order to achieve a proper balance between the exercise of the right to be heard and the protection of the integrity of the designation review process, reform is again necessary. The reforms advocated below seek to introduce

¹⁵⁰ While it has to be acknowledged that there have been criticisms of the Inspector-General in this regard (see Small D, above n 145), the author posits that the structure of the Inspector-General of Intelligence and Security Act 1996 does guarantee (to the extent possible) the impartiality and independence of the office.

a process by which entities can be heard when requesting a review by the Prime Minister, but that such hearing be conducted by the Inspector-General for Security and Intelligence.¹⁵¹

7.3.2(d) Status of classified security information. The protection of classified security information is something that is addressed several times within the Terrorism Suppression Act. Three sets of statutory provisions are relevant in this regard.

- On the issue of the status of classified security information in proceedings to extend a designation (or any appeal against such proceedings), the relevant parts of sections 38 and 41 provide:

38. Procedure on applications (and on appeals from decisions) under section 35 or section 55—

- (3) If information presented or proposed to be presented in support of the application includes classified security information,-
 - (a) the proceedings must be heard and determined by the Chief Justice, or by 1 or more Judges nominated by the Chief Justice, or both; and
 - (b) the Court must, on a request for the purpose by the Attorney-General and if satisfied that it is desirable to do so for the protection of (either all or part of) the classified security information, receive or hear (the part or all of) the classified security information in the absence of-
 - (i) the designated entity concerned; and
 - (ii) all barristers or solicitors (if any) representing that entity; and
 - (iii) members of the public.
- (4) Without limiting subsection (3), if the designated entity concerned participates in proceedings relating to an application under section 35 or section 55,-
 - (a) the Court must approve a summary of the information of the kind referred to in section 32(2) that is presented by the Attorney-General except to the extent that a summary of any particular part of the information would itself involve disclosure that would be likely to prejudice the interests referred to in section 32(3); and

¹⁵¹ Discussed below at 7.4.2(c) *Hearing of entities seeking reconsideration of designations.*

- (b) on being approved by the Court (with or without amendments directed by the Court in accordance with paragraph (a)), a copy of the statement must be given to the entity concerned.

41. Appeal against decision on application under section 35-

- (2) Subject to sections 38 to 40, the procedure for the appeal must be in accordance with rules of Court.

- The status of classified security information in any other proceedings (and appeals against decisions in such proceedings) is governed by section 39, as follows:

39. Procedure in other cases involving classified security information-

- (3) If information presented or proposed to be presented by the Crown includes classified security information, then section 38(3) (but not also section 38(4)) applies with all necessary modifications to the proceedings as if the proceedings were an application to the High Court under section 35 or section 55. However, if the proceedings are before the Court of Appeal, section 38(3)(a) does not apply.

- Finally, it is very significant that the above mechanisms by which classified information is protected are provided with what the author has described as a “trump card” in section 38(7):

Subsection (2) to (6) and section 39(3) and (4) apply despite any enactment or rule of law to the contrary.

The effect of the latter trump card is that, notwithstanding any finding that the provisions in sections 38, 39 and 41 are inconsistent with the right to natural justice, those provisions are nevertheless to be applied.¹⁵² Section 4 of the NZBORA provides the trump card with that effect. Still, two issues

¹⁵² The use and effect of classified security information in the designation process has been expressed by the responsible select committee chair, Graham Kelly MP, as “a necessary evil”: see Smith JE, *New Zealand’s Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities*, Ian Axford New Zealand Fellowship in Public Policy, December 2003, 62.

remain. The first is whether the provisions can be provided with more than one meaning, since section 6 will require the meaning most consistent with the NZBORA to be adopted. Next, although section 4 requires the trump card to prevail, the question *in principle* is whether the limitations upon natural justice imposed by these provisions are justifiable in a free and democratic society.

On the question of potential interpretations of the provisions, the author takes the view that the provisions have been drafted with sufficient precision that only one meaning is open in each case. Firstly, if the Attorney-General requests, and the Court is satisfied that “it is desirable to do so for the protection of (either all of part of) the classified security information”, then the Court must hear that information in the absence of the designated entity, its counsel and the public (section 38(3)(b)). The question of “desirability” is linked only to the protection of classified information. Having said this, the question of the ‘desirability’ of excluding information from one party to proceedings for the purpose of protecting classified security information *may* (depending on the approach taken by the Chief High Court Judge or his or her delegates) be applied in a robust manner to give effect to natural justice. At least in theory, the Judge could determine that is it *never* desirable to exclude the enjoyment of the right to natural justice for the protection of classified security information. It has to be acknowledged, however, that this is an assessment of what the Court *might* do and cannot therefore be relied upon with any certainty.

Secondly, where the Attorney-General is required to provide a summary of information “except to the extent that a summary of any

particular part of the information would itself involve disclosure that would likely prejudice the interests referred to in section 32(3)”, this is again a proviso precise in its language. Thirdly, in the context of judicial review proceedings, the terms of section 39(3) clearly exclude the requirement for the Attorney-General to provide a summary of information.

In the application of section 5 of the Bill of Rights Act, it is firstly notable that the provisions at hand do not exclude the rights to be informed of the case and to present the other side, but they limit the rights. This, as discussed in Chapter Four, is something that the Supreme Court of Canada has seen as important to determining whether provisions of an enactment are capable of justification.¹⁵³ This feature is preserved by virtue of the fact that the provisions call for their application on the particular facts of each case. The hearing of evidence in the absence of the entity or counsel will only occur “if it is desirable to do so” for the protection of classified security information. Likewise, the exclusion of classified security information from a summary will only occur “to the extent that a summary of any particular part of the information would itself involve disclosure that would be likely to prejudice the interests referred to in section 32(3)”.

Those factors would also go towards an argument that the limitations at hand are reasonable and proportionate. In some cases, that may be true. However, the author posits that a large number of designations are likely to be based upon high-level classified information, and *solely* upon such information. In those circumstances (even if they are rare), a designated entity (and its counsel) will be excluded from hearing information

¹⁵³ Chapter Four at 4.4.2(c) *Reasonable “limitation”*.

presented to the court and may thereby learn nothing of the reasons for the designation and be in a position where it cannot answer the case against it. Such situations would entirely oust the observance of natural justice, as enshrined in the *audi alteram partem* principle. Such situations would not, it is concluded by the author, be proportionate and justified in a free and democratic society.

Before closing on this discussion, there are two matters to be addressed. The first is that there are some parallels in New Zealand legislation to the TSA's treatment of classified security information. The Crown Proceedings Act 1950 provides the Crown with exemption from disclosing in civil proceedings documentation that would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand.¹⁵⁴ This exemption, however, pertains only to such prejudicial documentation and relates to 'normal' civil proceedings in which the Crown is involved and in respect of which classified information is unlikely to form the substance of the case. The Immigration Act 1987 also provides for the special treatment of classified security information (which is given an identical definition to that under the TSA).¹⁵⁵ As a safeguard, the process is combined with rights of review and the inclusion in the process of legal counsel and the Inspector-General of Security and Intelligence.¹⁵⁶ The provision of full disclosure is also a matter restricted in the case of information relating to the application for and making of warrants to intercept communications under the Misuse of

¹⁵⁴ Crown Proceedings Act 1950, section 27

¹⁵⁵ Immigration Act 1987, section 114B

¹⁵⁶ Immigration Act 1987, sections 114A – 114R.

Drugs Act 1976 and the Crimes Act 1961.¹⁵⁷ That process, however, does not deny an accused access to evidence that will be tendered against him or her and therefore does not impact upon the ability for an accused to answer the prosecution case.¹⁵⁸ Finally, a process very similar to that under the Terrorism Suppression Act is being proposed under the Identity (Citizenship and Travel Documents) Bill 2004.¹⁵⁹

The second matter to be addressed is that the Solicitor-General did, in his advice to the Attorney-General, give some brief attention to the treatment of classified security information under the Terrorism (Bombings and Financing) Bill.¹⁶⁰ His main emphasis, however, was on the definition to be given to classified security information. The only point concerning the justifiability of the consequent limitations upon natural justice were contained in a footnote, in which he said:¹⁶¹

In addition, I draw comfort from the decision of the Canadian Supreme Court in *Chiarelli v Canada (Minister of Employment and Immigration)* (1992) 90 DLR (4th) 289 in which that Court upheld against Charter attack a scheme under which, where security and intelligence issues were at stake classified security information need not be revealed to a deportee at a hearing before the Security Intelligence Review Committee.

With all due respect to the Solicitor-General, the latter summary of the Court's decision is misleading. The Supreme Court of Canada concluded, on the particular facts, that fundamental justice had been observed by the

¹⁵⁷ Misuse of Drugs Act 1976, sections 14-29, and Crimes Act 1961, sections 312A-312Q.

¹⁵⁸ This was held to be the case by the Court of Appeal in *R v Saifiti* [1994] 2 NZLR 403, 408.

¹⁵⁹ For a brief overview of the Bill, see New Zealand Law Society, 'Delay changes to citizenship criteria, NZLS says', LawTalk, 14 February 2005, 5.

¹⁶⁰ Letter from the Solicitor-General to the Attorney-General, above n 123, paras 21-22.

¹⁶¹ *Ibid*, footnote 2.

Security Intelligence Review Committee through the provision by the Committee to the respondent of documents summarising information and giving (in the view of the Court) sufficient information to know the substance of the allegations against him and to be able to respond.¹⁶² The provisions of the Terrorism Suppression Act, in contrast, has the potential to result in no substantive information being provided to an interested party. The Solicitor-General does not appear to have turned his mind to that point in his advice to the Attorney-General.

7.3.2(e) *The Ahmed Zaoui case*. A matter of clarification needs to be addressed before proceeding any further. Many have wrongly assumed that the case involving Mr Ahmed Zaoui, an Algerian national who entered New Zealand in December 2002 and was detained by authorities until December 2004, was a matter involving his designation and/or detention under the Terrorism Suppression Act.¹⁶³ Mr Zaoui's matter in fact involved his claim for refugee status, the application of the Immigration Act 1987 and processes outside the Terrorism Suppression Act instigated by the Director of Security. Mr Zaoui had been granted refugee status by the Refugee Status Appeals Authority, but the New Zealand Government sought his removal based upon section 129X of the Immigration Act 1987 and article 33(2) of the Refugee Convention, the latter providing that the principle of nonrefoulement (literally non-return) does not apply to a person

¹⁶² *Chiarelli v Canada (Minister of Employment and Immigration)* (1992) 90 DLR (4th) 289, 291.

¹⁶³ This is a question that has commonly been presented to the author during the conduct of various seminars and discussions on the subject of the Terrorism Suppression Act 2002.

in respect of whom there are reasonable grounds for regarding as a danger to the security of the country.

Having said this, there are some useful statements made by the New Zealand Court of Appeal and High Court concerning the use of classified security information in the issuing by the Director of Intelligence of a security risk certificate against Mr Zaoui. In an appeal against judicial review proceeding in the High Court, President Anderson of the Court of Appeal identified the relevant issue as follows:¹⁶⁴

As a general proposition, for a system to be fair, it would have to recognise and apply the ordinary principles of natural justice which in New Zealand are affirmed by s 27 of the New Zealand Bill of Rights Act 1990 ('BORA'). A fundamental aspect of natural justice is the right to know, and to be accorded the opportunity of being heard in respect of matters which might be considered in the course of a decision affecting a person's rights or interests. But it may sometimes be the case that the Contracting State's grounds for regarding a refugee as a danger to the security of that country are based on classified information, the disclosure of which, to others including the refugee facing refoulement, may compromise the source of the information or State security operations. This can produce a conflict between the refugee's rights to natural justice and the State's interest in its own security.

Notwithstanding that conflict, the High Court had held that the Director of Intelligence was required to provide Mr Zaoui with a summary of the allegations against him, provided that the information did not disclose classified security information which could not be divulged under the relevant provisions of the Immigrations Act.¹⁶⁵ The High Court's finding

¹⁶⁴ *Attorney-General v Zaoui (No 2)* [2005] 1 NZLR 690, para 4.

¹⁶⁵ *Zaoui v Attorney-General* [2004] 2 NZLR 339, 383.

on that account was not the subject of appeal. Useful reference to Justice Williams' judgment in the High Court can therefore be made:¹⁶⁶

[I]n struggling to reconcile their obligations under the international human rights covenants with national security concerns in a world plagued by more prevalent terrorism, other countries - including countries which have actually been subjected to terrorist attacks - have nonetheless found ways and adopted procedures which do not exclude those thought to be threats to security from procedural safeguards designed to ensure that, in a limited way, they can meet and challenge what is alleged against them through procedures which comply in as full a measure as possible with natural justice. For the most part, overseas experience such as that reviewed in the authorities and the affidavits filed on Mr Zaoui's behalf provides for:

- (a) Review by an independent functionary of unquestioned integrity;
- (b) The provision of summaries of classified information to the person concerned shorn of matter likely to identify source or proscribed from disclosure; and
- (c) Procedural fairness in the sense of the right to call evidence and present a case in opposition.

These seem consistent themes in countries comparable with New Zealand. Two of the three already apply in this country. There seems no reason why the third should not apply. Certainly, Part IVA and s 114I [of the Immigration Act] do not forbid it.

That position, it is posited by the author, is entirely consistent with the conclusion made earlier that the mechanisms under the Terrorism Suppression Act are currently inconsistent, in principle, with the requirements of natural justice.¹⁶⁷

7.3.3 *The Clash Between the ICCPR and the NZBORA*

Against the background of this analysis, a mixed and somewhat peculiar situation is exposed. Firstly, it appears that sections 20, 22, 26 and 34(1) - relating to the making of a designation, the provision of notice of a designation and the review of designations by the Prime Minister - can be

¹⁶⁶ Ibid, paras 162-163.

¹⁶⁷ See 7.3.2(d) *Status of classified security information*.

given interpretations that are consistent with the right to natural justice. The outcome of doing so, however, is problematic for a number of reasons, most importantly that a “NZBORA-consistent” interpretation neither caters for the special requirements of classified security information, nor the special nature of the Prime Minister’s office. The conclusion drawn has been that reform is necessary.

More significantly, it has been concluded that although the provisions of the Terrorism Suppression Act concerning classified security information cannot be invalidated or held to be ineffective through application of the Bill of Rights, these provisions are nevertheless in breach of article 14(1) of the ICCPR. New Zealand is thus in a position where the application and effect of its domestic law (the Terrorism Suppression Act and the Bill of Rights Act) renders it in breach of its international obligations (under the International Covenant on Civil and Political Rights). What are, or might be, the consequences of this?

As already established earlier in this thesis, the internal law of a nation cannot be relied upon as a justifiable reason for breach of that nation’s international obligations.¹⁶⁸ As also seen, the Human Rights Committee has expressly directed that New Zealand must, when implementing its counter-terrorist obligations under Security Council Resolution 1373, ensure that this is done in full conformity with the ICCPR.¹⁶⁹ The failure of New Zealand to do so will likely result in adverse comments being made

¹⁶⁸ Discussed in Chapter Five at 5.5.2(a) *The ‘normal course’ in finding a conflict.*

¹⁶⁹ Human Rights Committee, *Concluding observations of the Human Rights Committee: New Zealand*, 17 July 2002, CCPR/CO/75/NZL, para 11. Discussed in Chapter Four at 4.2 *Why Consider Human Rights in the Examination of Counter-Terrorist Legislation?*

by the Human Rights Committee in the next periodic report under article 40 of the Covenant. If the matter is made the subject of a communication under the ICCPR Optional Protocol, it could again see the Committee render adverse comments and direct New Zealand to amend its laws.¹⁷⁰ Thus, this chapter comes to the final issue to be considered: that of reform.

7.4 Reform

Given the different outcomes in the application of New Zealand's domestic versus international human rights instruments, and the resulting tension between the two, it now falls to be considered whether the relevant restrictions under the Terrorism Suppression Act should be abandoned or modified. They should not, it is posited, be abandoned. The protection of classified security information, and the terrorist designation process, are clearly both important matters.¹⁷¹ Abandoning the mechanisms by which classified security information can be protected would not only prejudice New Zealand's ability to use, gain and exchange such information, but it would also prejudice its work in countering terrorism.

However, if New Zealand wants to comply with its international obligations, reform is clearly necessary. To that end, three levels of reform are advocated. All three reforms are suggested to be necessary for New Zealand to implement its counter-terrorist designation process in a manner

¹⁷⁰ A communication can only be lodged by a person that is a *victim* of a breach of a right under the ICCPR: see article 5 of the First Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The effect of decisions of the Human Rights Committee ("views") is discussed in Chapter Four at 4.3.1 *The International Covenant on Civil and Political Rights*.

¹⁷¹ This has already been the subject of discussion within this chapter: see above at 7.3.2 *Limiting Natural Justice under the NZBORA*.

that is at least proportionate with the objectives sought to be achieved. It should be noted that, strictly, speaking, the reforms would still not fall within any expressed permissible limitation upon the right to a fair hearing under the ICCPR. As discussed, article 14(1) only permits restriction upon the “open justice” nature of the right. Notwithstanding that fact, it is suggested that the following reforms would balance the restriction upon rights so in a manner that is proportionate (and, as such, compliant with section 5 of the New Zealand Bill of Rights Act). As a consequence, it is proposed that the Human Rights Committee would be loathe to make overly adverse comments or directions against New Zealand in situations where it could be shown that New Zealand had taken all reasonable steps to ensure that the right has only been limited to the extent strictly necessary and in a manner that seeks to limit the right to the least possible extent and with safeguards preventing an abuse of the process.

7.4.1 Notice of Designations

As already seen, section 26 of the Terrorism Suppression Act requires notice of a designation to be made to an entity within New Zealand (or its representative in New Zealand) that has been designated as a terrorist or associated entity, on either an interim or final basis.¹⁷² Despite the various requirements for a notice, nothing requires such notice to include information about the information upon which the designation has been made. The first recommendation for reform is to amend section 26 of the Act, requiring information to be given of the reason(s) for the designation,

¹⁷² Discussed above at 7.1.1(f) *Notice of designations*.

subject to the need to protect classified security information. The following amendment to section 26 is recommended (new subsection (e)):

A notice under section 21(d)(i) or section 23(f)(i) (to notify the designated entity of the making of the designation under section 20 or section 22) –

- (a) must state the section under which the designation is made, and whether the entity concerned is designated as a terrorist entity or as an associated entity;
- (b) may describe the entity concerned by reference to any name or names or associates or other details by which the entity may be identified;
- (c) must state the maximum period for which the designation may have effect or, if it is made under section 22, the maximum period for which it may have effect without being extended;
- (d) must include general information about how it may be reviewed and revoked;
- (e) [must include a summary of the information upon which the designation was based, to the extent that this does not prejudice the interests referred to in section 32(3):]
- [(f)] must include any other information specified for the purposes of this paragraph by regulations made under this Act.

The aim of the new subsection (e) is to guarantee the right to be informed of the basis upon which a designated entity's interests have been affected, while at the same time protecting (to the extent necessary) the special status of classified security information. The limitation, in that regard, has been drawn from the wording of section 38(3)(b) of the Act.

7.4.2 Reinstatement of the Inspector-General's Review

The second reform recommended is the reinstatement of a modified form of the review of designations by the Inspector-General of Security and Intelligence.¹⁷³ There are a number of anticipated objectives and benefits in such a review process.

¹⁷³ As had been contained within the Terrorism (Bombings and Financing) Bill (see the select committee's interim report, above n 60), but then removed in the

7.4.2(a) *Review of designations.* The first proposed role of the Inspector-General would be to exercise the function envisaged within the first redraft of the Terrorism Suppression Bill: to undertake a mandatory review of all designations and consider, in that review, whether the tests for designation were properly applied and satisfied, when weighed against the information received by the Prime Minister. In doing so, the Inspector-General would act as an internal check upon the exercise of the significant decision-making power of designation. Not only is this important to the integrity of the designation process itself, but also to the criminal responsibility implications of such designations.¹⁷⁴ By introducing an immediate and mandatory checking mechanism, this also addresses the lack of notice and hearing prior to the making of a designation.¹⁷⁵ It is posited that the addition of this checking mechanism transforms the latter limitation upon natural justice into a proportionate and justifiable one.

Naturally, the power of review should come with the ability on the part of the Inspector-General to act upon his or her findings. Under the proposed regime in the Terrorism (Bombings and Financing) Bill, the Inspector-General was to have the power to revoke designations upon review¹⁷⁶ and it is proposed that any reinstatement of the Inspector-General's role under the TSA include the same authority to revoke. In essence, as summarised by the Solicitor-General in his review of the Bill when giving advice to the Attorney-General, the Inspector-General's

later Terrorism Suppression <Bombings and Financing> Bill (see the committee's final report, above n 65).

¹⁷⁴ Since the Terrorism Suppression Act prohibits certain dealings with designated entities: as discussed above at 7.2.1 *The Issue of Natural Justice*.

¹⁷⁵ Discussed above at 7.3.2(a) *The making of designations*.

¹⁷⁶ Terrorism (Bombings and Financing) Bill [first redraft], clause 17T(1).

review would amount to a *de novo* determination.¹⁷⁷ The decision of the Inspector-General should, it is proposed, be accompanied with notice of the decision being given to the designated entity. By doing so, the entity will be in a better position to assess whether to seek judicial review of the decision.

As was provided for in the Bill, it is proposed that the Inspector-General's review function be able to be triggered by the designated entity. The Bill had provided, in that regard, that if a designated entity had unsuccessfully applied to the Prime Minister to have a designation revoked (current section 34(1) of the TSA), then it could apply for review by the Inspector-General.¹⁷⁸

7.4.2(b) Review of notifications. The second role for the Inspector-General would be additional to that originally proposed by the Foreign Affairs, Defence and Trade Committee in its interim report on the Bill. It is again proposed that this be mandatory and undertaken at the same time as the latter review of any designation. The question for the Inspector-General to consider here, though, would be whether the notice under section 26 has been properly made, having specific regard to the proposed new subsection (e):

- (e) [must include a summary of the information upon which the designation was based, except in the case of classified security information to the extent that this might prejudice the interests referred to in section 32(3):]

¹⁷⁷ Terrorism (Bombings and Financing) Bill [first redraft], clause 17P(1): see letter from the Solicitor-General to the Attorney-General, above n 123, para 16.

¹⁷⁸ Terrorism (Bombings and Financing) Bill [first redraft], clause 17N(2).

This second role would require the Inspector-General to determine two things. First, whether the summary of information provided under the notice was a proper and fair reflection of the information upon which the designation was based. Next, it would require him or her to determine whether any exclusion of classified security information was necessary to the extent required to protect the interests referred to in section 32(3).

This power of review should again be accompanied with the ability on the part of the Inspector-General to take any necessary action. In this case, s/he should be able to direct that the notice be amended to include any additional information s/he deems necessary – that is, information upon which the designation was based, except classified security information (to the extent that this might prejudice the interests referred to in section 32(3)).

7.4.2(c) Hearing of entities seeking reconsideration of designations. The next proposed role for the Inspector-General addresses the specific concern of the manner in which requests to the Prime Minister to reconsider a designation are dealt with under section 34. The point has been made that there is currently no right, in such circumstances, to be heard or to receive information about the basis upon which the designation was made.¹⁷⁹ The latter aspect has been addressed, it is suggested, by recommending the new section 26(e) concerning the provision of information in the notice of designation and the associated power of review of the notice by the Inspector-General.

¹⁷⁹ Discussed above at 7.1.2(a) *Reviews initiated by a designated entity or interested party.*

What is recommended here is that the Inspector-General be empowered to receive submissions from an entity that requests review of their designation by the Prime Minister. However, it is posited that a careful balancing act must be achieved. The author has earlier criticised the fact that any reconsideration by the Prime Minister of a designation does not provide for the designated person to be heard. As already indicated, that is not to suggest that the Prime Minister should him/herself be required to hear a designated entity.¹⁸⁰ Likewise, the Inspector-General should also not be expected to hear any frivolous evidence or submissions. It is posited that in seeking to maintain the integrity of any process, the checks upon that process should themselves be reasonable and prudent. Thus the following process is recommended:

- Where an entity, or a third party with “an interest in the designation”,¹⁸¹ requests reconsideration of a designation by the Prime Minister under section 34(1) of the Act, the written notice requesting reconsideration should first be referred to the Inspector-General of Security and Intelligence.
- If the written notice does not disclose any information which, in the view of the Inspector-General, challenges the basis upon which the designation was made, then the Inspector-General should: (1) consider whether the information upon which the designation was based satisfies

¹⁸⁰ Discussed above at 7.3.2(c) *Review of designations by the Prime Minister*.

¹⁸¹ As currently permitted under section 34(1) of the Terrorism Suppression Act 2002.

the tests for designation under the Act;¹⁸² and (2) advise the Prime Minister accordingly. He or she should not, however, be required to hear from the applicant if the application does nothing to challenge the basis of the designation. To do so, it is suggested, would be pointless. Notwithstanding this, the Inspector-General should inform the applicant that the applicant's written notice does not disclose any information which challenges the basis upon which the designation was made and that, in the absence of such further information, s/he has reached the conclusion that the designation should stand (or be revoked) and has made a recommendation to the Prime Minister accordingly. By doing so, the applicant is thereby advised of the Inspector-General's recommendation and the reasons for it.

- If, in contrast, the written notice does disclose information which challenges the basis upon which the designation was made, then the Inspector-General should be required to advise the applicant that they can (a) file with the Inspector-General written submissions; and/or (b) attend at a specified time and place to be heard in person. After hearing from the applicant in this way, the Inspector-General should: (1) consider whether the information upon which the designation was based, together with any further information received, satisfies the tests for designation under the Act; and (2) advise the Prime Minister accordingly. Again, it is recommended that the Inspector-General should advise the applicant that s/he has reached the conclusion that the

¹⁸² In other words, s/he should confirm that the designation is valid.

designation should stand (or be revoked) and has made a recommendation to the Prime Minister accordingly.

- The latter process should, to ensure both fairness and efficiency, include appropriate time limits.

Such a process, in the view of the author, would both guarantee the right to be heard (where there is something to be heard about) and at the same time limit the Prime Minister's involvement in that process and restrict frivolous applications from taking the time of both the Prime Minister and Inspector-General. What must be remembered, as discussed earlier,¹⁸³ is that there is no right to be heard in person by an administrative tribunal. There is only a right to make representations. By instituting a system where representations can be made to the Inspector-General (with the ability for him or her to hear submissions in person), that right is preserved. Furthermore, by notifying an applicant of the Inspector-General's recommendations, the applicant is in a better position (it is suggested) to assess whether to seek judicial review of the recommendation, or of the Prime Minister's later decision to designate or refuse to revoke a designation.

7.4.3 Panel of Security-Cleared Counsel

The recommendations thus far have addressed the early stages of the designation process, not all dependent on action by a designated entity or interested third party. The final recommendation considered now concerns

¹⁸³ Above at 7.2.2(b) *The New Zealand Bill of Rights Act 1990 and the Terrorism Suppression Act 2002*.

the representation of an entity or interested third party in judicial proceedings under the Terrorism Suppression Act. Specifically, those proceedings relating to the extension of a designation (sections 35 and 41), or arising out of the making of a designation (section 33). In the case of such proceedings, the current position is as follows:

- Where the Attorney-General applies to extend a final designation (section 35), the High Court is required to receive any classified security information relating to the application without the presence of the designated entity (or its counsel) if that is desirable for the protection of the information (section 38(3)(b)).¹⁸⁴ The Attorney-General is however obliged to provide a summary of the information to the designated entity, except to the extent that this would involve disclosure of information that would prejudice those interests listed in section 32(3) of the Act.¹⁸⁵ Any appeal against a decision of the High Court to extend a designation restricts (in the way just mentioned) the appeal court's dealings with classified security information.¹⁸⁶
- Next, although the Act does not prevent a person from bringing judicial review proceedings arising out of the making of a designation (section 33), the High Court is again required to receive any classified security information relating to the application without the presence of the designated entity (or its counsel) if that is desirable for the protection of

¹⁸⁴ Discussed above at 7.1.3(a) *Proceedings for extension of designations*.

¹⁸⁵ Discussed above at 7.1.3 *Classified Security Information*.

¹⁸⁶ Terrorism Suppression Act 2002, section 41: discussed above at 7.1.3(a) *Proceedings for extension of designations*.

the information.¹⁸⁷ This time the Attorney-General is not required to produce a summary of the information.¹⁸⁸

These restrictions are clearly imposed for the purpose of protecting classified security information and are, to that extent, important ones. It has been concluded, however, that they are not proportional.¹⁸⁹ The recommendation made here is to address these restrictions by permitting an entity (that is the subject of extension proceedings) and/or interested person (the subject of review proceedings) to be represented by counsel and thereby ensure that those persons' interests are represented and put forward to the Court.

The principal objection to representation by counsel is likely to be that representation by counsel does not avoid the need to protect certain classified security information. What is proposed here, though, is the establishment of a special panel of legal counsel that have an appropriate level of security clearance so that they may be present during the otherwise "closed hearing" of classified information when section 38(3)(b) of the TSA is applicable. Such counsel, it is proposed, should also be entitled to make submissions to the Court on the content of any summary of information to be presented by the Attorney-General under section 38(4) of the Act. Doing so, it is posited, transforms what can otherwise be a blanket exclusion of disclosure into a justifiable and proportionate limitation upon the duty of disclosure. At least by having counsel present during the

¹⁸⁷ Discussed above at 7.1.2(a) *Reviews initiated by a designated entity or interested party.*

¹⁸⁸ Discussed above at 7.1.3(b) *Judicial review or other proceedings relating to designations.*

¹⁸⁹ Discussed above at 7.3.2(d) *Status of classified security information.*

hearing and consideration of all information before the Court, respondents or applicants in proceedings under sections 33, 35, 39, and 55 of the Terrorism Suppression Act can be sure that they have a level of capacity to respond to the case against them. The proposed reform would at the same time preserve the important need to protect classified security information.

For the sake of completeness, two further matters should be addressed. Firstly, it must be recognised that there is no direct equivalent to this proposal in any established procedures in New Zealand law. There are, however, some analogies. Panels of specialised counsel are not a new phenomenon. New Zealand retains panels of military counsel for the purpose of proceedings under the Armed Forces Discipline Act 1971; panels and categories of criminal legal aid counsel for ordinary criminal proceedings in New Zealand courts (administered under the Legal Services Act 2000); and specialised counsel for the child under the Care of Children Act 2004. Although these panels do not have (as the central requirement for being on the panels) the need for special security clearance,¹⁹⁰ they do have their own special requirements for relevant expertise.

The second issue that should be touched upon is that of choice. Given that any panel of security-cleared counsel is likely to be limited, could a non-Crown party to proceedings under the Terrorism Suppression Act complain that they have little or no choice in who is to represent them? This, however, is not seen as problematic and there are, again, analogies to be seen. Those charged within criminal offences who are granted legal aid

¹⁹⁰ Members of military defence panel must have a certain level of security clearance, but by virtue of the fact that they are members of the armed forces rather than as a specialised feature of their status as counsel.

have for a significant time had no choice at all in what counsel is to be assigned to represent them. It has been only a recent initiative of the Legal Services Agency to introduce a system of “preferred counsel”, whereby an applicant for criminal legal aid can nominate counsel to be represented. Although, in practise, preferred counsel is usually appointed, there is no obligation upon the Legal Services Agency to do so. Likewise, in family proceedings, it is the Family Court that appoints counsel for the child under section 7 of the Care of Children Act 2004, or section 30 of the Guardianship Act 1968. Appointment of counsel is at the sole discretion of the Family Court and the New Zealand High Court has recently pronounced that the child to be represented has no right to determine what counsel is to act.¹⁹¹

7.5 Conclusion

The process by which designations are made, reviewed, extended, and capable of being challenged is a complex one. It is central to the operation of the Terrorism Suppression Act anti-financing regime, and to New Zealand’s compliance with the Security Council’s identification of terrorist organisations. The process is important to New Zealand’s contribution to the international regime towards the suppression of the financing of terrorism. Designations are also important to the way in which others are able to deal with designated entities, and to the interests of the entity concerned. Entities are, by reason of their designation, restricted in their property and financial dealings and may be subject (upon extension of a

¹⁹¹ *In the matter of R*, unreported, 30/07/04, Kean J (HC), Auckland, para 61.

final designation) to forfeiture of their property to the Crown. Third parties are prohibited from financing, supporting, recruiting into, or providing financial or other property-related services to terrorist or associate entities. Financial institutions are bound to report financial transactions. In short, terrorist designations impact, in significant terms, upon both designated entities and those that might interact with them.

Identified within this chapter are a number of features of the designation process that give rise to serious concerns about the compliance of the process with various aspects of the right to natural justice. Most significant is the principle of hearing the other side, *audi alteram partem*, featuring within that the notions of equality of arms, the disclosure of information, the ability to make submissions and the receipt of reasons for the making of decisions. It has been concluded that the current regime under the Terrorism Suppression Act does not comply with New Zealand's obligations under the International Covenant on Civil and Political Rights (article 14(1)). Likewise, it has been concluded that although aspects of the regime cannot be invalidated by domestic courts in the application of the New Zealand Bill of Rights Act, features of the regime are otherwise incompatible with the normal standards of justifiable limitations upon rights in a free and democratic society.

A number of reforms have therefore been recommended within this chapter. Their aim is to produce a designation process that is workable, achieves compliance with New Zealand's international counter-terrorist obligations, and protects the special status of classified security

information. At the same time, the reforms aim to achieve a proportional balance between those objectives and the enjoyment of rights to justice.

Chapter 8

Democratic and Civil Rights

Democratic and civil rights include two freedoms of relevance to this chapter held to be important to western notions of democracy - namely, the freedoms of expression and association. The first matter to be examined in this chapter concerns the ability of the Prime Minister, under the International Terrorism (Emergency Powers) Act 1987, to prohibit the publication or broadcasting of certain matters relating to an international terrorist emergency. Freedom of expression, in the context of media control, is therefore at issue. The freedom of association is also to be considered. These are freedoms impacted upon by provisions of both the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001, and amending regulations (the Terrorism Regulations), and the Terrorism Suppression Act 2002.

8.1 Media Control

Since the events of September 11, 2001, and the advent of the 'War on Terror', these experiences have been cited as the cause of a decline in the freedom of the press.¹ Interestingly, in the case of New Zealand, there

¹ See, for example, the accounts of the organisation Reporters Without Borders, pointing to the physical violence and enforced disappearance suffered by journalists, the arrest and detention of media workers, censorship, and the surveillance of the internet: '2003 Round-Up', Reporters Without Borders, 6 January 2004, URL <<http://www.charter97.org/eng/news/2004/01/06/borders>> at 11 March 2005; and 'United States', Reporters Without Borders, 22 June 2004, URL <http://www.rsf.org/article.php3?id_article=10612> at 11 March 2005. See also United Nations Foundation, 'Report Shows Decline of Press Freedom with

have been no legislative changes since September 11 impacting upon media control. Rather, media control was something legislated for under the International Terrorism (Emergency Powers) Act 1987 (ITEPA) following the Rainbow Warrior bombing in 1985. Although an “international terrorist emergency”² under the Act has never been invoked, Assistant Commissioner of Police Jon White has reported that this was contemplated in 2003 when cyanide was mailed in threatening letters to the embassies of the United States and United Kingdom.³

Section 14 of the ITEPA provides the Prime Minister with certain rights to prohibit publication or broadcasting of certain matters relating to an international terrorist emergency:⁴

14. Prime Minister may prohibit publication or broadcasting of certain matters relating to international terrorist emergency-

(1) Where, in respect of any emergency in respect of which authority to exercise emergency powers has been given under this Act, the Prime Minister believes, on reasonable grounds, that the publication or broadcasting of—

- (a) The identity of any person involved in dealing with that emergency; or
- (b) Any other information or material (including a photograph) which would be likely to identify any person as a person involved in dealing with that emergency—

would be likely to endanger the safety of any person involved in dealing with that emergency, or of any other person, the Prime Minister may, by notice in writing, prohibit or restrict—

- (c) The publication, in any newspaper or other document; and
- (d) The broadcasting, by radio or television or otherwise,—

War on Terror’, UN Wire, 8 January 2004, URL <<http://www.unwire.org/UNWire>> at 12 January 2004.

² The definition of the term, and the activation of a state of emergency under the Act, are considered in Chapter Three at 3.8 International Terrorism (Emergency Powers) Act 1987.

³ Smith JE, *New Zealand’s Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities*, Ian Axford New Zealand Fellowship in Public Policy, December 2003, 11, note 57.

⁴ Subsections (4) and (5) of section 14 (concerning the publication of section 14 notices in the Gazette and proceedings of the House of Representatives) have not been reproduced.

of the identity of any person involved in dealing with that emergency, and any other information or material (including a photograph) which would be likely to identify any person as a person involved in dealing with that emergency.

(2) Where, in respect of any emergency in respect of which authority to exercise emergency powers has been given under this Act, the Prime Minister believes, on reasonable grounds, that the publication or broadcasting of any information or material (including a photograph) relating to any equipment or technique lawfully used to deal with that emergency would be likely to prejudice measures designed to deal with international terrorist emergencies, the Prime Minister may, by notice in writing, prohibit or restrict—

(a) The publication, in any newspaper or other document; and
(b) The broadcasting, by radio or television or otherwise,—
of any information or material (including a photograph) of any such equipment or technique.

(3) The Prime Minister may issue a notice under subsection (1) or subsection (2) of this section notwithstanding that the emergency in respect of which the notice is issued has ended.

Section 15 of the Act deals with the expiry, revocation and renewal of section 14 notices. Subsection (3) provides that, unless earlier revoked or extended (or unless the notice specifies the life of the notice), a section 14 notice will expire 12 months after the date on which it was issued. This provision is unaffected by whether the terrorist emergency continues to exist. Section 15(4) allows further extensions for periods of five years at a time, if renewal of the notice is necessary:

(a) To protect the safety of any person; or
(b) To avoid prejudice to measures designed to deal with international terrorist emergencies.

This part of the chapter considers the freedom of expression and the reasons underlying the desire to control the media when dealing with terrorism. The compatibility of section 14 of the ITEPA with the International Covenant on Civil and Political Rights (ICCPR) and New Zealand Bill of Rights Act 1990 (NZBORA) will then be examined. In

doing so, the justiciability of decisions of the Prime Minister concerning ‘media gags’ will also be considered.

8.1.1 Freedom of the Press

The freedom of expression is a matter dealt with under article 19(2) and (3) of the International Covenant. Paragraph (3) sets out the permissible limitations upon the freedom (to be discussed),⁵ while paragraph (2) expresses the substantive right:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

In very similar terms, section 14 of the New Zealand Bill of Rights guarantees “the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form”. The question to briefly consider within this part of the discussion is whether article 19 and section 14 afford protection to the media, since neither document expresses a ‘freedom of the press’. In the case of section 14 of the NZBORA, the approach of New Zealand courts has been to treat freedom of the press as an integral feature of the right of all members of the public to seek, receive and impart information and opinions.⁶

⁵ Discussed below at 8.1.3 *Media control and the ICCPR*.

⁶ See *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48, 61, where the court stated that “the right of freedom of the press is no more and no less than the right of all and any member of the public to make comment”. See also *Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641, 646, where Cooke P stated for the Court of Appeal:

The freedom of the press is not separately specified in the New Zealand Bill of Rights, our Bill differing in that respect from s 2 of the Canadian Charter of Rights and Freedoms and the First Amendment in the United States, but it is an important adjunct of the rights concerning freedom of expression affirmed in s 14 of the New Zealand Bill of Rights Act. They include “the freedom to

The situation under the International Covenant is slightly more complicated, however. The words of the Covenant again do not expressly include the freedom of the press, but the same argument as that adopted by New Zealand courts is applicable in the view of the author. The difficulty lies in the fact that there is no jurisprudence in this area since complaints to the Human Rights Committee under the First Optional Protocol to the ICCPR are limited to complaints by individuals.⁷ It was on that basis that communications 360/1989 and 361/1989 were dismissed by the Committee as being inadmissible under the Optional Protocol.⁸ The communications involved claims by printing companies, whose main purpose was to purchase and supply material to a publication company for the production, printing and publishing of weekly newspapers. Both communications were submitted on behalf of companies incorporated under the laws of Trinidad and Tobago. Under article 1 of the Optional Protocol, only individuals are able to submit a communication to the Human Rights Committee. As such, the particular communications were found to be inadmissible.⁹

Importantly, however, this does not invalidate the application of article 19 to the freedom of the press. The effect of what has just been discussed

seek, receive, and impart information... Decisions of this Court have reflected the importance of media freedom, quite apart from the Bill of Rights. *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 176 and *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 are two of the numerous examples which could be cited.

⁷ See Conte A, Davidson S and Burchill R, *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee* (Ashgate Publishing Ltd, 2004), 18-21.

⁸ *A Newspaper Publishing Company v Trinidad and Tobago*, Human Rights Committee Communication 360/1989; and *A Publication and a Printing Company v Trinidad and Tobago*, Human Rights Committee Communication 361/1989, para 12.2.

⁹ *Ibid.*

simply means that only individuals, as opposed to media groups or corporations, may complain to the Human Rights Committee about interference with their freedom of expression. The freedom is still a right guaranteed under the Covenant and an obligation in respect of which New Zealand must, as a State party, comply.

8.1.2 *Limiting the Freedom of Expression when Responding to Terrorism*

Control upon the media and its ability to publish or broadcast any matter is something that impacts upon the freedom of expression. In the language of the Rishworth steps, the right being invoked (the freedom of expression) applies to the circumstances being complained of (the Prime Minister's authority under sections 14 and 15 of the ITEPA).¹⁰ Because these provisions effect limitations upon the freedom of expression, the issue to then consider is whether the limitations are consistent with section 5 of the New Zealand Bill of Rights Act and the expression of the right within article 19 of the ICCPR. It is useful to firstly consider the reasons behind a desire to restrict the media when responding to terrorism.

In its report on emergencies, the New Zealand Law Commission spoke of the generally accepted notion that only in the most exceptional circumstances is it desirable or necessary to control the media in its coverage of events.¹¹ In doing so, the report identified various factors that might call for media control, from the perspective of both dealing with an instant terrorist emergency and the longer-term implications of

¹⁰ See Chapter Four at 4.3.2(a) *The 'unholy trinity' of sections 4, 5 and 6.*

¹¹ Keith K, *Final Report on Emergencies* (New Zealand Law Commission Report 22, 1991), para 7.140.

broadcasting and publication. On the subject of dealing with an actual terrorist incident, the report noted:¹²

Media coverage of terrorist events can compromise the efforts of the authorities to resolve those events and may also prejudice further responses to terrorist action. The primary concern is that the terrorist, by following the coverage of the incident, may be alerted to counteractive measures taken by the police and by the armed forces where they are involved. This forewarning may result in the failure of the operation and could place lives, of both anti-terrorist personnel and hostages (if any) at risk.

Other factors were also identified as having a potential impact upon the ability of authorities to deal with particular instances of terrorist activity.¹³

First to be identified was the obstruction of authorities by the physical presence of the media, although this is a matter that could apply to the physical presence of any person and is dealt with under section 10 of the ITEPA.¹⁴ Secondly was the fact that media representatives may become participants in the event by communicating directly with the terrorists and thereby potentially undermining the conduct of authorities. Again, however, it appears to the author that this is a matter capable of being dealt with under the police powers to restrict entry and require evacuation of emergency areas under section 10 of the Act.

The report also makes the point that media coverage may have an impact outside the operation of a particular terrorist emergency.¹⁵ This might occur through terrorist organisations gaining tactical information and technical knowledge from the media coverage of counter-terrorist

¹² Ibid, para 7.142-7.143. The report pointed to the siege of the Iranian Embassy in London in 1980 as a situation in which this almost arose. The police and SAS assault on the Embassy was filmed, although this was not broadcast live.

¹³ Ibid, para 7.144.

¹⁴ See Chapter Nine at 9.2.4 *International Terrorism (Emergency Powers) Act 1987*.

¹⁵ Above n 11, para 7.144.

operations. Such coverage might also expose the identity of members of counter-terrorist forces and thereby expose them to the risk of attack by terrorists. These are clearly undesirable consequences.

Bearing these issues in mind, consideration will next be had of the relationship between media control and the ICCPR, and the NZBORA justified limitations provision.

8.1.3 Media Control and the ICCPR

The freedom of expression, as guaranteed under the International Covenant, has already been identified briefly. The question here is whether sections 14 and 15 of the ITEPA fall within the permissible limitations in the Covenant. Article 19(3) sets out these limitations as follows:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Recognised within paragraph 3, then, is the fact that the exercise of the right to freedom of expression carries with it special duties and responsibilities permitting the imposition of restrictions upon the right, which may relate either to the interests of other persons or to those of the community as a whole. Within the terms of paragraph 3, any restriction must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and it must be necessary to achieve those legitimate

purposes.¹⁶ Any limitation must also be proportional and not implemented in a manner that nullifies the substance of the right to expression.¹⁷ Where a State seeks to justify a limitation as falling within the ambit of paragraph 3, the Human Rights Committee will require the State party to specify the precise nature of the threat allegedly posed by a person's exercise of freedom of expression and how the limitation achieves dissipation of that threat.¹⁸

Limiting the freedom of expression on the basis of national security was considered in *Park v Republic of Korea*.¹⁹ Korea stated that the restrictions in question²⁰ were justified in order to protect national security and that they were provided for by law, under article 7 of the National Security Law 1980 (Korea). Despite the potentially sensitive nature of security issues, however, the Committee took the view that it must still determine whether any measures taken are in fact necessary for the purpose stated. On the facts of the communication, the State party invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considered that the State had failed to specify the precise nature of the threat posed by the author's exercise of freedom of expression and therefore found that there

¹⁶ *Mukong v Cameroon*, Human Rights Committee Communication 458/1991, para 9.7.

¹⁷ *Freedom of Expression (Art. 19)*, CCPR General Comment 10 (1983), para 4.

¹⁸ See, for example, *Kim v Republic of Korea*, Human Rights Committee Communication 574/1994, para 12.5; *Laptsev v Belarus*, Human Rights Committee Communication 780/1997, para 8.5; and *Pietrataroia v Uruguay*, Human Rights Committee Communication r10.44/1979, para 17.

¹⁹ *Park v Republic of Korea*, Human Rights Committee Communication 628/1995. See also *Kim v Republic of Korea*, Human Rights Committee Communication 574/1994.

²⁰ Prohibiting the "praising, encouraging, or siding with or through other means the activities of an anti-State organization" (article 7(1) of the National Security Law 1980).

was no basis upon which the restriction could be considered compatible with article 19(3).²¹

In contrast to this communication, however, the ITEPA deals with specific emergencies (declared by no fewer than three Ministers upon advice from the Commissioner of Police, on the particular facts, to constitute an “international terrorist emergency”).²² Applying the various requirements of paragraph 3 identified above, the first requirement is clearly met, sections 14 and 15 being restrictions imposed by law. Next, to satisfy paragraph 3, the provisions must be in pursuit of the aims expressed in subparagraphs 3(a) and (b). Sections 14 and 15 appear to fit well within the aim of protecting national security and, equally, protecting public order or public health. The Prime Minister’s authority to restrict the media only arises where the information in question:

- “would be likely to endanger the safety of any person involved in dealing with that emergency, or of any other person”;²³ or
- “would be likely to prejudice measures designed to deal with international terrorist emergencies”.²⁴

The final requirement of paragraph 3 is that any limitation upon the freedom of expression be proportional and in response to specific identifiable threats caused by a continuance of the freedom.²⁵ In the main, the author considers that proportionality is met, and it is clear that these

²¹ Ibid, para 10.3.

²² See Chapter Three at 3.8 International Terrorism (Emergency Powers) Act 1987.

²³ Section 14(1) of the Act. See also section 15(4)(a).

²⁴ Section 14(2) of the Act. See also section 15(4)(b).

²⁵ Above n 17.

measures can only apply to identified, and expressly declared, states of international terrorist emergencies. The only matter of concern relates to section 14(3) of the ITEPA, which permits the continuance of restrictions or prohibitions under subsections (1) or (2) notwithstanding that the emergency has ended. A notice under section 14 automatically lasts for one year, unless earlier revoked by the Prime Minister.²⁶ The restrictions can then be extended for five year periods under section 15(4) if renewal of the notice is necessary for the protection of any person or to avoid prejudice to measures designed to deal with terrorism.²⁷ As identified earlier, the continued suppression of information may be necessary for the purpose of preventing to identification of counter-terrorist agents or to prevent terrorist organisations from gaining tactical or technical information on counter-terrorist operations and, to that extent, the ability for restrictions to apply after a state of emergency seems reasonable.²⁸ At face value, then, this seems appropriate.

The author's concern is that the Prime Minister's authority, in its current form, is absent any checking mechanism and could therefore be used to suppress the publication of information that does not pertain to the aims identified in subsections (1) and (2). During an actual state of terrorist emergency, the lack of a checking mechanism and the need for the Prime Minister to act decisively seems perfectly reasonable. Checking the continuance of 'media gags' after a terrorist emergency has ended, however, presents different considerations. The Act does not expressly

²⁶ Section 15(2) and (3) of the Act.

²⁷ Section 15(4) of the Act.

²⁸ Discussed above at 8.1.2 *Limiting the Freedom of Expression when Responding to Terrorism*.

permit the media to challenge the continuance of a prohibition in the domestic courts. Yet, should an individual complain to the Human Rights Committee, the Committee would require New Zealand to give reasons for the continued need of the prohibition or restriction.²⁹ The New Zealand Law Commission identified that the gravity of the circumstances giving rise to an emergency under the ITEPA will vary, as will the threat posed by the publication or broadcasting of information.³⁰ Questions should therefore be able to be asked as to whether those circumstances or threats justify prolonged media gags.

As noted by the Law Commission, the Human Rights Committee has levelled criticism at the media provisions of the ITEPA in its consideration of New Zealand's reports under the ICCPR.³¹ In its comments to New Zealand's second periodic report, the Committee noted that concerns raised by it during the examination of New Zealand's report concerning the scope of the ITEPA had not been alleviated.³² The Committee expressed particular concern about the 'closure provisions' of the ITEPA media gags.

8.1.4 Media Control and Judicial Review

Picking up on the concerns raised about the continuance of media gags, the perceived problem is that the continuance cannot be challenged under the ITEPA and, as such, there is no guarantee that continuance notices *are* connected with the stated objectives in sections 14 and 15. Thus, the potential effect of the provisions, in the absence of some review

²⁹ See General Comment 10, above n 17, and *Park v Republic of North Korea*, above n 19.

³⁰ Above n 11, para 7.151.

³¹ *Ibid*, para 7.152.

³² *Concluding observations of the Human Rights Committee: New Zealand*, CCPR/A/44/40 (1989), paras 393 and 402.

mechanism, is to permit the unfettered abuse of media gags under the ITEPA. The issue thus arises: are notices under sections 14 and 15 reviewable? The starting point is to recognise that the ITEPA does not prohibit judicial review and, as such, the media could *prima facie* challenge the continuance of media gags through judicial review proceedings. The next point to consider, however, is whether decisions of the Prime Minister under sections 14 or 15 of the ITEPA are justiciable.

The most recent word on the justiciability of ministerial decisions in New Zealand is the case of *Curtis v Minister of Defence*.³³ Citing its earlier decision in *CREEDNZ v Governor General*³⁴ and decisions of the Supreme Court of Canada and House of Lords, the New Zealand Court of Appeal concluded that:³⁵

A non-justiciable issue is one in respect of which there is no satisfactory legal yardstick by which the issue can be resolved. That situation will often arise in cases into which it is also constitutionally inappropriate for the Courts to embark.

In the making of decisions under sections 14 and 15, the author is of the view that such decisions are justiciable, applying the test identified by the Court of Appeal. Rephrasing the Court's test in the context of the ITEPA provisions, there are two questions to ask: (1) are decisions under sections 14 and 15 ones in respect of which it would be constitutionally inappropriate for the courts to embark; and (2) is there a satisfactory legal

³³ *Curtis v Minister of Defence* [2002] 2 NZLR 744.

³⁴ *CREEDNZ v Governor General* [1981] 1 NZLR 359.

³⁵ Above n 33, 752 (para 27).

yardstick by which to determine whether the Prime Minister's decisions under sections 14 and 15 have been properly made?³⁶

Considering the first question, the author posits that the determinations at hand are not ones of a constitutionally sensitive nature calling for judicial deference. The decisions concern the safety of persons and the potential prejudice of information to future counter-terrorist operations. Unlike *Curtis*, they are not decisions concerning the disposition of armed forces or other policy-based matters. This goes to answer the second question in the affirmative. In exercising judicial review of decisions under sections 14 and 15, the courts would be considering the application of facts to the statutory tests under those provisions to determine whether the continuance of notices is proper. The question to be considered by the courts would be this: *would the publication or broadcasting of the identity of any person involved in the emergency (or other information or material that would lead to the identify of such a person) be likely to either (1) endanger the safety of that or any other person (sections 14(1) and 15(4)(a)), or (2) prejudice measures designed to deal with international terrorist emergencies (section 14(2) and 15(4)(b))?* The question is, in the author's view, a justiciable one.

Against that background, the author concludes that judicial review is available as a safeguard against the improper use of sections 14 and 15 of the ITEPA. As will be seen in the discussion that follows, the consequence

³⁶ This also appears to be consistent with the Court of Appeal's approach in the *Zaoui* case, where the decision to issue a "security certificate" was held to be subject to judicial review in the absence of an express exclusion of judicial review: *Attorney-General v Zaoui (No 2)* [2005] 1 NZLR 690.

of this conclusion is significant to the question of the provisions' compatibility with the New Zealand Bill of Rights Act.

8.1.5 Media Control and section 5 of the NZBORA

Turning to the question of whether sections 14 and 15 of the ITEPA are justifiable under section 5 of the NZBORA, the first consideration (the existence of an important objective) seems easy to answer. To the extent that media gags are issued for the purposes identified under sections 14(1) and (2) and 15(4), those objectives are clearly pressing and substantial not only to deal with instant emergencies but also to preserve the integrity of counter-terrorist operations, and the safety of persons. Those objectives, in the author's view, satisfy the first limb of the *Oakes* and *Radio New Zealand* limitations test.³⁷

In applying the second, proportionality, limb of the section 5 test one must first be satisfied that the legislative provision is rationally connected to the achievement of the objective. Again, this seems easy to answer in the affirmative. The structure of sections 14 and 15 is such as to restrict or prohibit the publication or broadcasting of information likely to prejudice the safety of a person or the integrity of future counter-terrorist operations. The second proportionality factor requires the legislative provision to impair the right as little as reasonably possible. This goes to the question of whether sections 14 and 15 are the least intrusive means by which their objectives might be achieved. So long as safeguards exist against the improper use of these provisions, the author takes the view that sections 14 and 15 satisfy the minimal impairment test. The current statutory

³⁷ See Chapter Four at 4.4.2(e) *The substantive test under section 5*.

framework does not exclude judicial review of section 14 and 15 decisions and, as concluded above, these decisions are justiciable so that adequate safeguards are present. In the view of the author, this conclusion also goes to the final factor of the proportionality test, rendering the effect of the provisions upon the freedom of the press proportional to the objectives of protecting the safety of persons and the ability to deal with future counter-terrorist operations. As such, sections 14 and 15 are 'consistent' with the New Zealand Bill of Rights and no further enquiry under the Rishworth steps is required.

8.1.6 Conclusion

In conclusion, sections 14 and 15 of the International Terrorism (Emergency Powers) Act 1987 are compliant with both the ICCPR and NZBORA. In a disappointingly brief and cursory examination of the ICCPR and NZBORA, the Law Commission concluded that media control under the ITEPA was ineffective³⁸ and that their encroachment upon the ICCPR and NZBORA were not justified.³⁹ It therefore recommended the repeal of sections 14 and 15, preferring a model by which voluntary guidelines be adopted by the media⁴⁰

With due respect to the Commission, the author disagrees. Certainly, the provisions do limit the freedom of the press, a freedom guaranteed by article 19 of the ICCPR and section 14 of the NZBORA. However, the restricted purposes in respect of which media gags may be issued,

³⁸ No reasons for this conclusion are given, other than the fact that the Act is 'cumbersome' in determining whether a terrorist emergency exists: above n 11, paras 7.160 and 7.161. This does not, however, go to the question of whether the media control provisions are themselves ineffective.

³⁹ Ibid, 7.162.

⁴⁰ Ibid.

combined with the availability of judicial review as a safeguard against abuse of the powers under the provision, mean that the ITEPA provisions comply with the limitations provisions of article 19(3) of the ICCPR and section 5 of the NZBORA.

8.2 Association with Terrorist Entities

Chapter Three identified provisions of both the Terrorism Regulations and the Terrorism Suppression Act 2002 as impacting upon the freedom of association. Because the Terrorism Regulations have now expired,⁴¹ however, this Chapter will only consider the provisions of the Terrorism Suppression Act. Sections 8 and 10 of the Act prohibit the provision of funds to, or collection of funds for, a designated entity,⁴² or the provision of property or financial services to such entities. Sections 12 and 13 make it an offence to recruit another person into an organisation or group, knowing that the organisation or group is either a terrorist entity or participates in “terrorist acts”, or to participate in such an organisation or group.⁴³ Section 13A criminalises the harbouring or concealing of a person, where it is known (or ought to be known) that the person has carried out, or intends to commit, a terrorist act. Broadly speaking, then, these provisions prohibit various means of associating with terrorist entities.

⁴¹ The regulations expired on 31 December 2002, by which time the Terrorism Suppression Act 2002 had come into force.

⁴² For a full discussion of the process by which persons or groups are designated either “terrorist” entities or “associated terrorist” entities, see Chapter Seven.

⁴³ The latter term is defined and discussed in Chapter Three at 3.11.2(b) *Offences*.

8.2.1 Freedom of Association

The freedom of association is a right protected by both the ICCPR and NZBORA. Section 17 of the Bill of Rights expresses the freedom in very simple terms, describing it as “the right to freedom of association”. Article 22(1) of the Covenant is not much more helpful in its definition of the right:

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Regrettably, the jurisprudence of the Human Rights Committee does not help define this right within the context of the current examination, since complaints before the Committee have concerned the membership of individuals in political parties or trade unions, and strike actions.⁴⁴ In the context of the Bill of Rights, there has likewise been little academic and judicial scrutiny of the freedom of association. The point made by Professor Paul Rishworth, however, is that the freedom of association is often viewed as a right linked with other rights.⁴⁵ The freedom of association may permit, in turn, the exercise of the freedoms of expression (section 14) and peaceful assembly (section 16). Likewise, an interference with the freedom of association may involve discrimination against a person based upon that person’s political opinion (section 19)⁴⁶, or it may interfere with the manifestation of a person’s religious beliefs (section 15).

⁴⁴ Conte, Davidson and Burchill, above n 7, 61 and 65-67.

⁴⁵ Rishworth P, Huscroft G, Optican S and Mahoney R, *The New Zealand Bill of Rights* (Oxford University Press, 2003), 354.

⁴⁶ See also section 21(1)(j) of the Human Rights Act 1993.

8.2.2 Association with Terrorist Entities and the ICCPR

The general freedom of association is qualified under article 22 of the International Covenant by paragraph 2:

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Considering article 22(2) step by step, the first point is that the restrictions in question are provided for under the Terrorism Suppression Act and are therefore “prescribed by law”.⁴⁷ The second requirement is that the restrictions are necessary in a democratic society for the furtherance of certain interests. In the case at hand, it seems easily arguable that the identified provisions of the Terrorism Suppression Act are in pursuit of almost all of those interests by contributing to the international suppression of terrorism and by putting into place means by which terrorist threats or acts within New Zealand can be suppressed and responded to: national security; public safety; the protection of public health; and the protection of rights and freedoms of others (including, for example, the right to life). The author therefore concludes that the non-association provisions of the Terrorism Suppression Act are, in and of themselves, consistent with the ICCPR. However, in saying that the provisions are “in and of themselves” consistent with the International Covenant on Civil and Political Rights, the author takes the view that this is dependent on the proper and just

⁴⁷ For a discussion of the meaning of that term, see Chapter Four at 4.4.2(d) *The limitation must be “prescribed by law”*.

designation of terrorist entities.⁴⁸ An abuse of that process might, for example, be used to prevent membership of all Islamic organisations rather than properly proscribing membership of organisations that fall within the strict terms of the designation process.

It should be mentioned that membership of proscribed organisations is not something new. In considering regulations made by the relevant Minister in Ireland for the “preservation of the peace and the maintenance of public order”, the House of Lords had to determine in *McEldowney v Forde* whether it was proper for the Minister to have proscribed membership in a “republican club”.⁴⁹ By three judges to two, the House of Lords held that Forde’s conviction for being a member of such a club was proper. While the division in opinion might seem problematic, the dissenting judgments were on the question of whether there was sufficient evidence that “republican clubs” caused any prejudice to peace or good order.⁵⁰ There was no dispute as to whether membership *can* be proscribed for the purposes of preserving the peace and maintaining public order. Earlier still, the Nuremberg Tribunal held that proscribing membership of a criminal organisation was proper.⁵¹

8.2.3 Association with Terrorist Entities and the NZBORA

By reason of the plain expression of the freedom of association under the NZBORA, the provisions at hand do impact upon the freedom. The

⁴⁸ See Chapter Seven.

⁴⁹ *McEldowney v Forde* [1971] AC 632.

⁵⁰ *Ibid*, Lord Pearce (651-654) and Lord Diplock (658-665).

⁵¹ International Military Tribunal, Nuremberg, judgment of 30 September 1946. For a discussion of this, see Keith K, ‘Terrorism, Civil Liberties and Human Rights’, a paper presented at the 13th Commonwealth Law Conference 2003, (CR4) Terrorism: Meeting the Challenges / Finding the Balances, 13-17 April 2003, 32-33.

expression of the right does not qualify itself in any way that could render those provisions consistent with its definition. The issue of consistency must therefore be determined by reference to the section 5 justified limitations provision.

The author takes the view that, of all the provisions examined within this thesis, the ones at hand present the most clear-cut case of justified limitations upon a right or freedom. The objectives of the various provisions are all directed, and rationally connected to, the suppression of the financing of terrorism, the participation in terrorist groups and the bringing to justice of the perpetrators of terrorist acts. Bearing in mind the consequences of terrorism,⁵² these prohibitions are manifestly proportional to the limitations upon the freedom of association. It is therefore concluded that the provisions are ‘consistent’ with the Bill of Rights Act, within the meaning of Rishworth’s Step Two. No breach of the NZBORA occurs.

Again, however, the author qualifies this conclusion on the proviso that this is dependent on the proper and just administration of the process by which a person or group may be designated a “terrorist” or “associated” entity. To some extent, this concern is alleviated through the express qualifications within sections 8(2) and 10(2) of the Terrorism Suppression Act, which make it clear that these provisions do not make it an offence to provide or collect funds with the intention that they be used, or knowing that they are to be used, for the purposes of advocating democratic

⁵² See Chapter Five at 5.1 The Impact of Terrorism on Security and Human Rights.

government or the protection of human rights, so long as such an organisation is not involved in carrying out terrorist acts.

8.3 Conclusion

The freedom of expression, a right incorporating the freedom of the press, is impacted upon by the media control provisions of the International Terrorism (Emergency Powers) Act 1987. Section 14 of the Act allows the Prime Minister to issue media gags concerning any information or material relating to an international terrorist emergency which would be likely to prejudice the safety of a person or the integrity of counter-terrorist operations. That, in itself, raises no particular problems and constitutes a justified limitation upon the freedom of expression, under both the ICCPR and NZBORA. More problematic is the fact that a media gag can operate for a period well after the state of emergency. Again, in principle, this is justifiable if the extension occurs for the purpose of protecting a person or the integrity of future operations. The author's concern with the provision is with achieving checking mechanisms to ensure that the authority under sections 14 and 15 is not abused. It has been concluded, in that regard, that decisions made under these provisions are justiciable, thereby facilitating the means by which abuse of the power to issue media gags can be checked. In those circumstances, the media control provisions of the ITEPA are lawful and justified.

A number of provisions of the Terrorism Suppression Act 2002 prohibit various means of associating with entities designated under the Act as terrorist or associated entities. This is the least problematic

interference with rights considered in this thesis, easily justifiable under both the ICCPR and NZBORA. That conclusion relies, however, on the proper use and administration of the designation process under the Terrorism Suppression Act.

Chapter 9

Criminal Procedure Rights and Search, Arrest and Detention Rights

Chapter Three of this thesis identified various aspects of New Zealand's counter-terrorist legislation impacting upon the criminal process. Rights and freedoms relevant to the criminal process are set out within both the International Covenant on Civil and Political Rights (ICCPR) and the New Zealand Bill of Rights Act 1990 (NZBORA), and it is therefore proper that these matters be examined more closely. The statutory provisions concerned are not limited to the most recent items of New Zealand's counter-terrorist legislative regime, but are to be found in four of the seven items of legislation identified within Chapter Three: the Aviation Crimes Act 1972; the International Terrorism (Emergency Powers) Act 1987; the Maritime Crimes Act 1999; and the Counter-Terrorism Act 2003. The principal item of the counter-terrorist legislative framework in New Zealand (the Terrorism Suppression Act 2002) does not concern itself with criminal process matters, other than the creation of criminal offences. Four sub-groups of rights will be examined in this chapter: the privilege against self-incrimination; search and seizure; arrest and detention; and privacy and surveillance.

9.1 The Privilege against Self-Incrimination

The first matter to be considered within this chapter is the amendment of the Summary Proceedings Act 1957 (SPA), effected through the Counter-

Terrorism Act 2002. A new section 198B was inserted into the SPA, allowing police to demand assistance to access computer data by providing police with any data protection codes or other information necessary to access that data.

In giving evidence before the Foreign Affairs, Defence and Trade Committee, the author submitted to the Select Committee that the proposed provision (under clause 33 of the Counter-Terrorism Bill) offended the privilege against self-incrimination.¹ Clause 33, as it then read, provided:

198B Person with knowledge of computer or computer network to assist access

- (1) A constable executing a search warrant may require a specified person to provide information or assistance that is reasonable and necessary to allow the constable to access data held in, or accessible from, a computer that is on premises named in the warrant.
- (2) A specified person is a person who-
 - (a) is the owner or lessee of the computer, or is in the possession or control of the computer, or is an employee of any of the above; and
 - (b) has relevant knowledge of-
 - (i) the computer or a computer network of which the computer forms a part; or
 - (ii) measures applied to protect data held in, or accessible from, the computer.
- (3) Every person commits an offence and is liable on summary conviction to a term of imprisonment not exceeding 3 months or a fine not exceeding \$2,000 who fails to assist a constable when requested to do so under subsection (1).

In brief terms, the author submitted that this clause would offend the privilege against self-incrimination by compelling a person to provide assistance to police (under clause 33(1) above) who may be investigating an offence against that person or who might, as a result of gaining access to the computer data, be provided with information that would incriminate

¹ Conte A, *Submissions to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill (27-1, 2003)*, 12 May 2003, paras 29-58.

that person. In apparent response to this submission, clause 33 was amended, with the Select Committee reporting to the House that this was to explicitly preserve the right against self-incrimination, continuing by stating:²

Whether a broadly worded statutory provision requiring the supply of information, and making no reference to the privilege against self-incrimination, overrides this privilege is a question of its construction. A Court must be satisfied that a statutory power of questioning was meant to exclude the privilege. We are advised that this conclusion is unlikely to be reached unless it is either explicitly provided for, or is a necessary implication of the provision. Our recommended amendments make it clear that a person is required to provide information that is reasonable and necessary to allow the police to access data held in, or accessible from, a computer in particular circumstances, but that does not itself tend to incriminate the person. We note that there are several other instances of statutory obligations on citizens to assist police or other agents.

Section 198B of the Summary Proceedings Act retains the original form of subsections (1) and (2), which set out the rule requiring the provision of assistance and to whom that rule applies. The final form of the section now includes new subsections (3), (4) and (5), with subsection (6) retaining the penalty for failure to comply (as had been provided for in the first draft of the Bill):

- (3) A person may not be required under subsection (1) to give any information tending to incriminate the person.
- (4) Subsection (3) does not prevent a constable from requiring a person to provide information that-
 - (a) is reasonable and necessary to allow the constable to access data held in, or accessible from, a computer that-
 - (i) is on premises named in the warrant concerned; and
 - (ii) contains or may contain information tending to incriminate the person; but
 - (b) does not itself tend to incriminate the person.

² Foreign Affairs, Defence and Trade Committee, *Report on the Counter-Terrorism Bill, A Government Bill, 27-2, Commentary*, presented to the House 8 August 2003, 10.

- (5) Subsection (3) does not prevent a constable from requiring a person to provide assistance that is reasonable and necessary to allow the constable to access data held in, or accessible from, a computer that-
- (a) is on premises named in the warrant concerned; and
 - (b) contains or may contain information tending to incriminate the person.

An issue that becomes apparent at the outset is that of interpretation, that is, *exactly what do subsections (3), (4) and (5) mean and how do they inter-relate?* Once that issue is resolved, if it can be, the question of the consistency of section 198B with human rights falls for consideration. Discussion of the potential application of the provision to both counter-terrorism and other law enforcement investigations will also be had.

9.1.1 The Meaning of section 198B of the Summary Proceedings Act 1957

In its original form, the meaning of the proposed provision was quite clear. Clause 33 was to enable a police constable executing a search warrant to require assistance or information to be given in order to access data in a computer within the premises being searched. Subclause (1) - which remains identical to section 198B(1) - set out the authority by which a constable could make such a request. Subclause (2) - again remaining the same - specified who may be the subject of such a request. Subclause (3) - which became section 198B(6) of the Summary Proceedings Act - created an offence where a person refuses to comply with the constable's request, punishable by a maximum of three months' imprisonment or a fine of up to \$2,000.

The new subsections (3), (4) and (5), however, require a close reading. Subsection (3) appears to protect the privilege against self-incrimination,

stating that “a person may not be required under subsection (1) to give any information tending to incriminate the person”. Certainly, the Select Committee reported that the protection of the privilege against self-incrimination was the intention of this added provision.³ However, the author doubts that this is the effect of subsection (3) when read in the entirety of section 198B.

The first point to note is that subsection (3) only prevents a constable (acting under subsection (1)) from requiring a person to give information that might incriminate them. The reality, however, is that subsection (1) only authorises a constable to require information to be provided for the purpose of allowing the constable to access data within a computer. That information will take the form of either a password, or information about the location within a computer of certain data. That in itself cannot, posits the writer, be incriminating information, since it only informs a constable on how to access data. In other words, subsection (3) does nothing. Even without the additional subsection (3), section 198B(1) can only ever permit a constable to request information on how to access data. It does not authorise a constable to require any further information and the purported restriction upon section 198B(1) created by subsection (3) is therefore redundant.

Next, it appears that subsections (4) and (5) in fact expressly override the privilege against self-incrimination. The two provisions are almost identical in nature, except that subsection (4) relates to the provision of information necessary to access data (e.g., a password), and subsection (5)

³ Ibid, 10.

relates to the provision of assistance necessary to access such data (e.g., the physical operation of a computer). However, the two provisions specifically envisage that data accessed as a result of such information or assistance “contains or may contain information tending to incriminate the person”.⁴ They envisage (and do not prohibit) the provision of information and assistance which will *result* in the person incriminating him or herself. For those reasons, it is not envisaged that a liberal, rights-based, interpretation of section 198B could be argued in favour of reading the provision consistently with the privilege against self-incrimination.

It is therefore concluded that although subsection (3) - when first read - appears to preserve the privilege against self-incrimination, the overall amendment of section 198B does the opposite.

9.1.2 Section 198B and Human Rights

According to the latter analysis, section 198B provides the police with authority to require information which may lead to the discovery of incriminating information. In the writer’s view, this represents a significant extension to existing police powers and a departure from common law and statutory rights. The provision raises questions about the following rights:⁵

- The common law right of every person to be presumed innocent until proven guilty, with the resultant burden on the State to prove guilt from

⁴ Summary Proceedings Act 1957, section 198B(4)(a)(ii) and (5)(b).

⁵ It should be noted, of course, that the rights expressed within the International Covenant on Civil and Political Rights and the New Zealand Bill of Rights Act 1990 are limited in their application to situations where a person is either arrested or detained, or charged with an offence. The significance of this is a matter for later analysis at 9.1.4 *Self-Incrimination, the NZBORA and the ICCPR*.

investigation to conviction (and the relationship this might have with section 25(c) and (d) of the NZBORA and article 14(2) of the ICCPR).

25. Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (c) The right to be presumed innocent until proved guilty according to law;
- (d) The right not to be compelled to be a witness or to confess guilt: [New Zealand Bill of Rights Act 1990]

Article 14

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
[International Covenant on Civil and Political Rights]

- The right to silence (codified within the NZBORA, section 23(4), in the context of a person being arrested or detained under an enactment).⁶

23. Rights of persons arrested or detained

- (4) Everyone who is-
 - (a) Arrested; or
 - (b) Detained under any enactment-for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

- The right to legal advice (codified within the NZBORA, section 23(1)(b), in the context of a person being arrested or detained under an enactment).⁷

23. Rights of persons arrested or detained

- (1) Everyone who is arrested or who is detained under any enactment-
 - (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right;

⁶ There is no equivalent right within the International Covenant on Civil and Political Rights.

⁷ Again, there is no equivalent within the International Covenant on Civil and Political Rights. Article 14(3)(b) only guarantees the right to counsel in the preparation of a defence: see Conte A, Davidson S and Burchill R, *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee* (Ashgate Publishing Ltd, 2004), 128-129.

Two questions arise:

1. What is the extent, and effect, of the common law privilege against self-incrimination and right to be presumed innocent?
2. How does section 198B interact with the codified rights to silence and legal advice, and the presumption of innocence, under the NZBORA and ICCPR?

9.1.3 Self-Incrimination and the Common Law

Existing quite independently of New Zealand's human rights legislation and corresponding international obligations is the long-held common law privilege against self-incrimination and the right to be presumed innocent. The right to be presumed innocent until proven guilty is exercised through the burden upon the State throughout all stages of the criminal process, from investigation to conviction. For example, an accused person has no obligation to give evidence at trial, nor to disprove any allegation against him or her. This has been held to be so even where the only person in possession of information relevant to the elements of an offence is the accused.⁸ The common law privilege against self-incrimination is intimately linked with the presumption of innocence, exercisable through the right to silence. No person may be compelled to say or do anything

⁸ See *Attygale v R* [1936] 2 All ER 116 (Privy Council). Here, the accused was charged in respect of an illegal operation performed on a woman while she was under chloroform. The defence case was that no operation took place. The trial judge directed the jury that, the facts being specifically within the knowledge of the accused, the burden of proving the absence of any operation was upon the accused. On appeal, the Privy Council held that the direction was an incorrect statement of the law, and that the onus of proof to establish that there had been an operation remained with the prosecution.

that might incriminate him or her.⁹ The New Zealand Court of Appeal has held that the privilege against self-determination is not limited to testimony and discovery in judicial proceedings. The Court held, in *Taylor v New Zealand Poultry Board*, that this privilege was capable of applying outside Court proceedings when the obligation to answer questions, or give information, or to provide or disclose documents, was imposed by statute.¹⁰

The combined affect of the privilege against self-incrimination and the presumption of innocence is that a person cannot be compelled to assist in the investigation and prosecution of any offence against him or her by being required to make any statement or provide any information (documentary or otherwise). The question, then, is what affect this has upon the operation of section 198B of the Summary Proceedings Act.

Since Parliament is Sovereign, the normal interaction between common law and statute is that Acts of Parliament prevail over the common law. As summarised by Professor Joseph “Parliament’s words can be neither judicially invalidated nor controlled by earlier enactment”.¹¹ Prima facie, then, the common law privilege against self-incrimination and the presumption of innocence have no impact upon section 198B. As Joseph himself discusses, however, the courts have taken a guarded approach when Parliament has attempted to restrict the role of the judiciary or take away the rights of citizens.¹² In the case of *New Zealand Drivers’*

⁹ See *Rice v Connolly* [1966] 2 All ER 649 (Queen’s Bench Division), applied in *Waaka v Police* [1987] 1 NZLR 754 (New Zealand Court of Appeal).

¹⁰ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 401.

¹¹ Joseph PA, *Constitutional and Administrative Law in New Zealand*, (2nd ed, Brookers, 2001), 461.

¹² *Ibid*, 485-495.

Association v New Zealand Road Carriers, Justices Cooke, McMullin and Ongley noted:¹³

We have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights.

More strongly worded, Cooke J later questioned whether “some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them”.¹⁴ Despite the apparent strength of those statements, however, no New Zealand court has invalidated or refused to apply a statutory provision on the basis that it encroaches upon common law rights.

It is at this point that further discussion of *Taylor v New Zealand Poultry Board* is called for, the case having similarities with the issue at hand.¹⁵ The case concerned the operation of regulation 57(3) of the Poultry Board Regulations which, like section 198B of the Summary Proceedings Act, required a person to provide information to prescribed officers.¹⁶ Taylor was a poultry farmer who refused to answer questions properly asked under regulation 57(3) and he was subsequently convicted on three charges under regulation 57(4).¹⁷ Notwithstanding the fact that the Court of Appeal held that the privilege against self-incrimination was capable of applying outside court proceedings, it qualified this decision by stating that

¹³ *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390.

¹⁴ *Fraser v State Services Commission* [1984] 1 NZLR 116, 121. See also *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

¹⁵ Above n 10.

¹⁶ The Poultry Board Regulations 1980 were made pursuant to an empowering provision in the Poultry Board Act 1980 (section 24(1)).

¹⁷ Regulation 57(4) of the Poultry Board Regulations 1980 made it an offence to refuse to answer any enquiries made under regulation 57(3).

the scope of the privilege must be determined in the context of the particular statute being examined. Adopting the words of the Select Committee when reporting on the Counter-Terrorism Bill, the privilege against self-incrimination “is a question of its construction”.¹⁸ For the Court of Appeal, Cooke J stated:¹⁹

The common law favours the liberty of the citizen, and, if a Court is not satisfied that a statutory power of questioning was meant to exclude the privilege, it is in accordance with the spirit of the common to allow the privilege. [emphasis added]

In a recent case concerning legal professional privilege in New Zealand, the Privy Council considered the question of statutory provisions overriding or excluding the privilege. The question before it was whether the Law Practitioners Act 1982 excluded legal professional privilege either expressly or “by necessary implication”.²⁰ The Privy Council held that a necessary implication was one which the express language of the statute clearly showed must have been included.²¹ In considering the issue, reference was made to Lord Hobhouse’s explanation in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*.²²

A necessary implication is not the same as a reasonable implication... A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation. [original emphasis]

¹⁸ Above n 2, 10; discussed above at 9.1 The Privilege against Self-Incrimination.

¹⁹ Above n 10, 402.

²⁰ *B v Auckland District Law Society* [2004] 1 NZLR 326.

²¹ *Ibid*, 349 (para 58).

²² *Ibid*. *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] WLR 1299, para 45.

In the context of section 198B of the Summary Proceedings Act, it is concluded that the necessary implication of the structure of the provision is to exclude the privilege against self-incrimination.²³ The common law must therefore give way. The wording of subsections (4) and (5) clearly preserve the power of questioning under subsection (1). The courts must, it is therefore posited, take the statutory power as meaning to exclude the privilege and could not interpret the provision as allowing the common law privilege to operate.

9.1.4 Self-Incrimination, the NZBORA and the ICCPR

The first point to note in the examination of the interaction between section 198B of the SPA and both the NZBORA and ICCPR is that neither human rights instrument expressly codifies a privilege against self-incrimination. The question is whether the provisions of the NZBORA and/or ICCPR might be taken to incorporate this privilege.

In the context of the common law rights discussed, it was concluded that the privilege against self-incrimination, linked with the presumption of innocence and the right to silence, combined to prevent a person from being compelled to assist in any investigation or prosecution against him or her. The question is whether this notion extends to the combination of rights under the ICCPR and NZBORA²⁴

9.1.4(a) Article 14(2) of the ICCPR. Article 14(2) of the International Covenant sets out the presumption of innocence (until proved guilty

²³ Discussed above at 9.1.1 *The Meaning of section 198B of the Summary Proceedings Act 1957.*

²⁴ Those rights identified earlier at 9.1.2 *Section 198B and Human Rights.*

according to law). It is the only provision within the ICCPR dealing, expressly or impliedly, with the rights identified as being relevant to the privilege against self-incrimination. Its limitation, however, is that the right only applies to persons “charged with a criminal offence”. Thus, the starting point is to acknowledge that - where a person has not been charged with any offence - then article 14(2) does not apply (even in principle).

More importantly, even where a person is charged with an offence and - in the investigation of that offence - the person is asked for information by a police officer under section 198B(1) of the SPA, it is highly doubtful that article 14(2) lends any ‘protection’ to the person charged. It would be implausible to suggest that the presumption of innocence, by itself, implies a privilege against self-incrimination. Certainly, the jurisprudence of the Human Rights Committee has not sought to infer such a privilege in its application or consideration of article 14(2).²⁵ It is therefore concluded that section 198B of the Summary Proceedings Act 1957 does not breach article 14(2) of the International Covenant on Civil and Political Rights.

9.1.4(b) Section 25 of the NZBORA. The first point made about article 14(2) of the ICCPR is equally applicable to section 25 of the NZBORA. The rights set out within section 25 apply only to those that are “charged with an offence”. The second point that was made (that the privilege cannot be inferred from the presumption of innocence) is equally applicable when looking at section 25(c) of the Bill of Rights.

The only remaining provision that has been identified as having potential relevance is section 25(d). This codifies the right not to be

²⁵ Conte, Davidson and Burchill, above n 7, 125-126.

compelled to be a witness or to confess guilt. Again, however, the author concludes that the section does not apply to circumstances in which section 198B operates. Subsection (1) only authorises an officer to require information or assistance to be given to facilitate access to data on a computer within the premises being searched. It does not require a person to be a witness, nor to confess guilt. Section 25 of the NZBORA does not, therefore, 'pass' or move beyond Rishworth's first step in the application of the operative provisions of the Bill of Rights.²⁶

9.1.4(c) Section 23 of the NZBORA. The rights to silence and to a lawyer are similarly limited in the potential scope of their application, this time to situations where a person is "arrested" or "detained under any enactment". Only then are the rights triggered. The right to silence does more directly reflect the privilege against self-incrimination and the guarantee of a right to consult with counsel strengthens that privilege by ensuring that a person is advised of the application of the privilege to the process of investigation. In other words, in the limited situation of a request under section 198B(1) being made while a person is arrested or detained, section 23(1)(b) and (4) of the Bill of Rights can operate. Step 1 of the Rishworth application process is satisfied (limited to the specific situation identified). An observation to make at this point is that it is only section 23(4) - the right to silence - that is directly relevant and the subject of further examination. The right to counsel is seen by the author as simply a supporting mechanism which may at times facilitate the exercise of the right to silence.

²⁶ Discussed in Chapter Four at 4.3.2(a) *The unholy trinity of sections 4, 5 and 6.*

Proceeding with the next step, one then has to consider whether the operation of section 198B(1) is 'inconsistent' with section 23(4) of the NZBORA where a person is arrested or detained. In doing so, the first question to consider is whether section 198B(1) effects a limitation upon the right to silence. In other words, how far does the right to silence stretch? Consider the following situation:²⁷

A (a New Zealand citizen) has made a donation to B (a Muslim organisation in Auckland, which has been made the subject of a final designation as an associated terrorist entity). Police arrive at A's property and formally arrest him, charging A with an offence under section 10(1) of the Terrorism Suppression Act 2002 (making money available to B, knowing that B was designated under the Act as an associated terrorist entity). A is properly cautioned under section 23(1)(b) and (4) of the NZBORA.

Police have a warrant to search A's premises, suspecting that he may have funded other proscribed entities. They locate a computer in A's study and request A to provide the password to the computer (under section 198B(1) of the SPA). Having been told upon arrest that he has the right to silence, A refuses to provide the police with the computer password.

The author concludes that the right to silence extends - at least in principle - to this situation. Section 198B(1) limits the right to silence by requiring A to provide information to the police enabling them to access data on his computer. That being the case, the next question within Rishworth's Step 2 is whether this limitation is 'consistent' with the Bill of Rights by application of section 5 of the NZBORA. Addressing the preliminary issues in the application of section 5: the onus would be upon the Crown to establish that section 198B is a justified limitation in any challenge against its validity or operation; section 198B, it is posited, only effects a 'limitation' upon the right to silence (limited in its operation to the

²⁷ As an extension of the factual situation identified in Chapter Seven at 7.2.1 *The Issue of Natural Justice*.

situations identified in subsections (1) and (2)); and it is 'prescribed by law' (being a statutory provision).²⁸

The difficulty in applying the substantive test under section 5 of the NZBORA is that section 198B of the SPA has no clear, or single, objective other to assist general law enforcement through the investigation of offences. Although this provision was enacted under the Counter-Terrorism Act 2003, it forms part of the Summary Proceedings Act 1957 and is not restricted in its application to the pursuit of counter-terrorism. Section 198B has the potential to apply to any situation in which the police are executing a search warrant. Taking this general objective, the first question in the application of section 5 is whether the objective (assisting law enforcement through the investigation of offences) relates to concerns which are pressing and substantial in a free and democratic society. Law enforcement is certainly an important societal concern and, for the sake of continuing with this enquiry, it is assumed that a court will take this limb of the section 5 test as being satisfied.

Turning to the second limb of section 5, three questions must be considered.²⁹ First, is the legislative provision (section 198B) rationally connected to the achievement of its objective? As discussed in Chapter Five, it is sufficient to show that the provision logically furthers the objective and this question is a normally answered in the affirmative without too much trouble.³⁰ Section 198B provides police with the means

²⁸ See Chapter Four at 4.4.2 *Limiting Rights under the Bill of Rights Act and Human Rights Act*.

²⁹ See Chapter Five at 5.4.3(e) *A summary on proportionality*.

³⁰ See Chapter Four at 5.4.3(b) *Factor 1: Measures rationally connected to the achievement of the objective*.

to access computer data, which easily furthers the objective of assisting law enforcement through the investigation of offences. The second question asks whether the legislative provision impairs the right to a minimal extent (as little as reasonably possible). Again, this part of the overall test has been applied in a flexible manner by the Supreme Court of Canada, focussing upon whether the provision is an appropriate means of giving effect to the objective, rather than whether the provision is proportional. It is very difficult to consider this second factor separately from the third, proportionality, factor. Combined, there is considerable difficulty in satisfying the justified limitations test, because of the broad nature of section 198B (applying to the execution of any search warrant). In considering the third factor, then, this will require the Crown to establish that the effects of the legislative provision are proportional to the importance of its objective. In examining the case law on proportionality, it has been concluded that consideration of four factors are relevant to this final step in the application of section 5:³¹

(a) What are the effects of the limiting provision upon the right invoked?

The answer is that section 198B of the Summary Proceedings Act has the effect of negating the right to silence, requiring a person to provide access to computer data that may incriminate him or her.

³¹ See Chapter Five at 5.4.3(d) *Factor 3: Proportionality between the effects of the measures and the importance of the legislative objective.*

(b) What is the level of importance of the objective of the provision?

The difficulty in answering this question lies in the fact that section 198B applies to the execution of any search warrant. It might therefore be argued that the importance of the objective depends upon the particular circumstances surrounding the issuing of the warrant (that is, the reasons for the warrant being issued, and the type of criminal conduct to which the evidence sought to be obtained through the warrant relates). In the factual scenario set out above, for example, the warrant to search A's premises is based upon the suspicion that A has funded terrorist entities, contrary to section 10(1) of the Terrorism Suppression Act 2002. This is an important objective. However, it should be noted that a search warrant can be issued for the purpose of finding evidence relating to any offence punishable by imprisonment³² including, for example, indecent exposure under the Summary Offences Act 1981 (making a person liable to imprisonment for a term not exceeding three months).³³ The relevance of this to section 198B is that computer data might, for example, include electronic photographs of such an event. While the exposure of one's genitals in public is not something that the public should be expected to tolerate, the objective of countering such activity is clearly not as important as countering the financing of terrorist organisations. That conclusion is supported by the fact that an offence against section 10(1) of the Terrorism

³² Summary Proceedings Act 1957, section 198.

³³ Section 27(1) of the Summary Offences Act 1981 provides that "Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who, in or within view of any public place, intentionally and obscenely exposes any part of his or her genitals".

Suppression Act makes a person liable to imprisonment for a term of up to seven years (as opposed to a maximum of three months for indecent exposure). Thus, the currently broad scope of section 198B has the very undesirable effect that the importance of its objective relies upon the particular context in which the provision is applied.

- (c) What is the importance of (or degree of protection provided by) the right invoked?

The right to silence when charged with an offence, and the underlying privilege against self-incrimination, are two of the most important rights in the criminal process. The European Court of Human Rights has described the right to silence and the accompanying privilege as “generally recognised in international standards which lie at the heart of the notion of a fair [criminal] procedure”.³⁴ Professor Rishworth describes the rights as “fundamental in New Zealand’s criminal procedure”.³⁵ As already discussed, they are rights that the common law has long-recognised also.³⁶

- (d) Are the effects (identified at (a) above) proportional to the objective (identified at (b) above), having regard to the importance of the right (identified at (c) above)?

It is here that the broad scope of the potential application of section 198B is felt and provides materially different outcomes. Consider

³⁴ *Murray v United Kingdom* (1996) 22 EHRR 29, para 45: as quoted in Rishworth P, Huscroft G, Optican S and Mahoney R, *The New Zealand Bill of Rights* (Oxford University Press, 2003), 646.

³⁵ Rishworth P, Huscroft G, Optican S and Mahoney R, *The New Zealand Bill of Rights* (Oxford University Press, 2003), 646.

³⁶ Discussed above at 9.1.3 *Self-Incrimination and the Common Law*.

again the two examples above (execution of a warrant in the investigation of charges of (1) the financing of terrorism versus (2) indecent exposure). In the first case, the author takes the view that although the right to silence is indeed of very high import, the limitation upon the right effected by section 198B is proportional to the objective of suppressing the financing of terrorism.³⁷ In the second case, however, the author concludes that limiting the right to silence in the pursuit of evidence relating to an indecent exposure is not proportional. The latter objective is, relatively speaking, nowhere near as important as the right to silence and the underlying privilege against self-incrimination.

Returning to the application of Rishworth's Steps in the application of the NZBORA, Step 2 cannot therefore be answered outside the specific application of section 198B. The most that can be said is that section 198B might be consistent with the Bill of Rights (by application of section 5), depending on the nature, and circumstances surrounding the issuing, of the search warrant. Where this results in a finding that the operation of section 198B is justified under section 5 of the NZBORA, then this means that its operation is 'consistent' with the Bill of Rights, bringing consideration of the Bill of Rights to an end. Where the operation of section 198B fails the proportionality test, however, one must proceed to Step 3. These differing

³⁷ Note that the New Zealand courts have been clear on the permissible limits of warrants issued under section 198 of the Summary Proceedings Act concerning the type of evidence that may be seized during the execution of a warrant. The New Zealand Court of Appeal pronounced at an early stage that any item seized must be referable to the offence in respect of which the warrant was issued: *McFarlane v Sharp* [1972] NZLR 838, 84. The case was cited with approval, although distinguished in its application to the facts, in the more recent Court of Appeal decision in *R v Burns* [2002] 1 NZLR 203, 211 (para 28).

results prompt the author to advocate reform, which will be discussed later.³⁸

The third step advocated by Rishworth is to determine whether an alternative interpretation of the enactment (section 198B) is possible and whether this is consistent with the right invoked. If it is, then section 6 of the NZBORA will demand that the courts apply this alternative interpretation. The writer takes the view that such an alternative interpretation of section 198B is not open, having regard to subsections (4) and (5) of that provision. As concluded above, these subsections envisage (and do not prohibit) the provision of information and assistance which will *result* in the person incriminating him or herself.³⁹ As such, application of Step 4 results in a finding that section 198B will (in the absence of satisfying the proportionality test) be in an 'irreconcilable conflict' with the Bill of Rights. As such, section 4 of the NZBORA will demand that section 198B must prevail of the right to silence.

9.1.4(d) Summary on section 198B of the SPA and section 23(4) of the NZBORA. Because the latter analysis of the interaction between section 198B of the SPA and section 23(4) of the NZBORA has been somewhat

³⁸ Discussed below at 9.1.5 *Reform of section 198B of the Summary Proceedings Act*.

³⁹ Discussed above at 9.1.1 *The Meaning of section 198B of the Summary Proceedings Act 1957*.

lengthy and involves a number of different considerations, it is useful to summarise the various conclusions made:

- The relevance of the section 23(4) right to silence to the operation of section 198B is limited to circumstances where a person is first arrested or detained and then made subject to a request under section 198B.
- In the situation where a person is first arrested or detained and then requested to provide information under section 198B, the right to silence should - in principle - operate, but is limited by section 198B.
- The general objective of assisting law enforcement through the investigation of offences will probably satisfy the first limb of the section 5 justified limitations test.
- Section 198B is rationally connected to the objective of assisting law enforcement through the investigation of offences.
- Section 198B probably impairs the right to silence as little as reasonably possible, although the broad scope of the section's potential application may result in a court concluding otherwise.
- Determining whether the effects of section 198B are proportional to its objective, depends upon the nature, and circumstances surrounding the issuing, of the search warrant.
- In the case of a warrant to search premises in the pursuit of evidence relating to the financing of terrorist entities, it has been concluded that this objective is proportional to the limitation imposed upon the right to

silence. In that case, the operation of section 198B is 'consistent' with the New Zealand Bill of Rights Act.

- In the case of warrants to search premises in the pursuit of evidence relating to much more minor offences (carrying low penalties upon conviction) it has been concluded that proportionality is not achieved. The operation of section 198B in these circumstances is 'inconsistent' with the Bill of Rights.
- In the latter cases, it has been concluded that there is no alternative 'consistent' interpretation of section 198B relevant to the application of section 6 of the NZBORA. Section 4 of the latter Act will therefore operate to 'save' section 198B from invalidation by the courts.

9.1.5 Reform of section 198B of the Summary Proceedings Act

The analysis of section 198B of the Summary Proceedings Act has thus far revealed various matters. The report of the Select Committee to the House of Representatives, advised that its proposed amendment to clause 33 of the Counter-Terrorism Bill would explicitly preserve the privilege against self-incrimination. In actual fact, however, the words of the provision (as enacted) show that the provision envisages and does not prohibit the compelling of a person to give information and assistance which might result in the police gaining access to incriminating evidence. This is contrary to the long-held common law right to silence and privilege against self-incrimination. However, due to the express terms of section 198B and the primacy of legislation over the common law, the courts could not interpret section 198B as allowing these common law rights to operate.

It has been concluded that section 198B does not conflict with the ICCPR, nor does it conflict with section 25 of the NZBORA. The relationship of the provision with section 23 of the Bill of Rights is, however, more complex. The immediately preceding discussion has revealed that - where section 198B is activated following an arrest or detention - there are numerous weaknesses in justifying the limitation imposed by section 198B upon the privilege against self-incrimination. Although section 4 of the NZBORA ultimately acts to save section 198B from invalidation, the weaknesses in finding the provision to be a justified limitation mean that New Zealand may be acting outside the international guidelines on the limitation of rights.⁴⁰ It has been concluded that this would be the case, for example, where section 198B operated in respect of minor offences.

This being the case, it is proposed that section 198B should be amended to restrict its operation to the investigation of serious offences, the suppression of which can be justified as a pressing and substantial concern proportional to the important status of the right to silence. In giving evidence before the Counter-Terrorism Bill the author submitted that clause 33 should have been amended to restrict its application to counter-terrorism by adopting the following amendment to the original form of the clause (amendments are shown in square brackets):

198B Person with knowledge of computer or computer network to assist access

(1) [Subject to subsection (3), a] ~~A~~-constable executing a search warrant may require a specified person to provide information or

⁴⁰ See Chapter Five, in particular 5.2.3 *Commission on Human Rights*, 5.2.4(b) *Council of Europe*, and 5.4.3(a) *Does the section 5 proportionality test fit with the external guidelines on counter-terrorism and human rights?*

assistance that is reasonable and necessary to allow the constable to access data held in, or accessible from, a computer that is on premises named in the warrant.

- (2) A specified person is a person who-
 - (a) is the owner or lessee of the computer, or is in the possession or control of the computer, or is an employee of any of the above; and
 - (b) has relevant knowledge of-
 - (i) the computer or a computer network of which the computer forms a part; or
 - (ii) measures applied to protect data held in, or accessible from, the computer.
 - (3) [A constable may require assistance under subsection (1) if -
 - (a) the premises named in the warrant are owned, leased or occupied by an entity for the time being designated under the Terrorism Suppression Act 2002 as a terrorist entity or as an associated entity; or
 - (b) the computer at the premises named in the warrant is owned, leased or used by an entity for the time being designated under the Terrorism Suppression Act 2002 as a terrorist entity or as an associated entity; or
 - (c) the constable believes, on reasonable grounds, that the computer holds data relating to the preparation of a terrorist act, as defined by section 5 of the Terrorism Suppression Act 2002.]
- [(4)] Every person commits an offence and is liable on summary conviction to a term of imprisonment not exceeding 3 months or a fine not exceeding \$2,000 who fails to assist a constable when requested to do so under subsection (1).

It is proposed that the restrictions upon the operation of section 198B, contained within subsection (3), would render the provision justifiable under section 5 of the Bill of Rights. Three weaknesses had been previously identified in the justifiability of the provision:⁴¹

- The general objective of assisting law enforcement through the investigation of offences will probably satisfy the first limb of the section 5 justified limitations test.

⁴¹ As summarised above at 9.1.4(d) *Summary on section 198B of the SPA and 23(4) of the NZBORA*.

- Section 198B probably impairs the right to silence as little as reasonably possible, although the broad scope of the section's potential application may result in a court concluding otherwise.
- Determining whether the effects of section 198B are proportional to its objective, depends upon the nature, and circumstances surrounding the issuing, of the search warrant.

The author posits that the proposed restrictions address those weaknesses and thus would make section 198B 'consistent' with the Bill of Rights (even with its limitation upon the right to silence). As an aside, the restrictions within the proposed subsection (3) might also be expanded to include other pressing and substantial concerns, such as the suppression of child pornography for example.⁴²

9.1.6 The Application of section 198B Beyond Counter-Terrorism

One final matter requiring discussion is the issue of counter-terrorism and the potential manipulation by States of this important objective as a means of legitimising the extension of State powers. In introducing the Counter-Terrorism Bill on 1 April 2003, Minister of Justice Phil Goff said that the Bill "reflects the need for New Zealand to ensure we have a comprehensive legislative framework in place that reflects the new, more dangerous era of international terrorism that we live in".⁴³ Apparent from the foregoing

⁴² Since this is outside the scope of this thesis, however, such further matters are not considered.

⁴³ Phil Goff MP, "Counter-Terrorism Bill – Introduction", Parliamentary Speech, 1 April 2003, summarised at URL <<http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=16392>> at 4 March 2005.

discussion, however, is the fact that section 198B of the Summary Proceedings Act 1957 has the potential to apply beyond counter-terrorism. It applies to the exercise of any search warrant issued under section 198 of the Act.

The establishment of broad legislative provisions like section 198B within the umbrella of the Counter-Terrorism Act 2003 was a matter of consistent criticism in submissions to, and evidence before, the Foreign Affairs, Defence and Trade Committee.⁴⁴ It was also a criticism from within the Select Committee, Keith Locke MP describing the Bill as “fraudulent” due to the fact that a number of its legislative amendments had nothing to do with terrorism.⁴⁵ Similar concerns were expressed during the Select Committee hearing process by Committee Member Wayne Mapp MP.⁴⁶ In the view of the author, those criticisms were quite valid. In attempting to justify the inclusion of non-terrorism specific provisions within the Counter-Terrorism Bill, the Select Committee reported to the House that, after consulting with the Minister of Justice, the majority of the Committee agreed that the non-terrorism specific provisions should remain within the Bill. The report stated that:⁴⁷

The Minister told us that it is accepted that there are strong links between terrorist activity and other organised crime, such as arms smuggling and drug importation. However, these activities are not

⁴⁴ Including submissions and evidence by the author, the Privacy Commission and the New Zealand Law Society: see *Submissions to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill 2003*, Parliamentary Library, Wellington.

⁴⁵ Keith Locke MP, “Counter-Terrorism Bill – First Reading”, Parliamentary Speech, 2 April 2003, copy at URL <<http://www.greens.org.nz/searchdocs/speech6173.html>> at 1 July 2003. See also the Foreign Affairs, Defence and Trade Committee report on the Counter-Terrorism Bill, above n 2, 13.

⁴⁶ Foreign Affairs, Defence and Trade Committee Hearing on the Counter-Terrorism Bill, Old Parliament House (Room G.003), Wellington, 15 May 2003.

⁴⁷ Above n 2, 3.

always associated with terrorism and terrorist acts are essentially the same as ordinary criminal offences committed with a different motive. The investigative powers contained in the bill are critical to allowing police to identify terrorist activity effectively. Therefore, we do not believe it is possible to make this distinction in legislating for investigation of these activities.

With all due respect to the majority of the Committee and the Minister of Justice, the analysis within this chapter of section 198B of the Summary Proceedings Act does not support that position. The provision applies to the investigation of any offences punishable by imprisonment, the greater majority of which will fall outside any link between terrorism and organised crime. Furthermore, it has been shown (in the preceding discussion advocating reform) that section 198B could, in fact, have been enacted in a way that restricts its application to counter-terrorism.

Significantly, the upshot of this concern is not limited to matters of domestic politics and internal wranglings to extend State powers. New Zealand's enactment of generally applicable provisions under the specific vehicle of the Counter-Terrorism Act is also contrary, in the author's view, to the international guidelines on counter-terrorism discussed in Chapter Five. Although these guidelines have been characterised by the author as "soft law", it has been posited that they are highly influential given the consistency between the various sources of the guidelines. They represent, in the view of the author, the standards generally accepted by international society as being applicable to the countering of terrorism in democratic States.

The *Guidelines* advocated by the Committee of Ministers to the Council of Europe in July 2002 provide that where measures taken by

States to combat terrorism restrict human rights, those restrictions must be defined as precisely as possible and be necessary to the objective of countering terrorism.⁴⁸ The *Guidelines* of the High Commissioner for Human Rights, presented in February 2002, provide that (to be lawful) limitations imposed by counter-terrorist legislation must be necessary for public safety and public order, and for the protection of the rights and freedoms of others.⁴⁹ Finally, the *Draft Principles and Guidelines* within the 2004 report of the Special Rapporteur to the Sub-Commission on the Promotion and Protection of Human Rights provided that:⁵⁰

Counter-terrorism measures should directly relate to terrorism and terrorist acts, not actions undertaken in armed conflict situations or acts that are ordinary crimes.

By extending beyond counter-terrorism in its potential application, the author concludes that section 198B does not comply with any of these guidelines. New Zealand has therefore acted improperly in the passing of section 198B under the Counter-Terrorism Act 2003. This strengthens the need, it is posited, for the reform proposed earlier.

⁴⁸ Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, (Council of Europe Publishing, 2002), article III(2): discussed in Chapter Five at 5.2.4(b) *Council of Europe*.

⁴⁹ Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/81, 27 February 2002, E/CN.4/20018, Annex. *Proposals for "further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001). Compliance with international human rights standards*, I General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism, para 4(b).

⁵⁰ Koufa KK (as Special Rapporteur), *A Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, 11 August 2004, E/CN.4/Sub.2/2004/47, para 9.

9.2 Search and Seizure, and Arrest and Detention

Security of the person from unreasonable search and seizure is again something guaranteed by both the ICCPR (article 17) and the NZBORA (section 21). Identified as having the potential to impact upon these rights are sections 12 and 13 of the Aviation Crimes Act 1972 (ACA), which set out powers of search of passengers, baggage and cargo. Section 17 of the Act also confers certain powers, upon an aircraft commander, to search persons on an aircraft. In the context of international terrorist emergencies, section 10(2)(b), (d) and (e) of the International Terrorism (Emergency Powers) Act 1987 (ITEPA) confers upon police (and military acting as an aid to the police) various powers of entry into, or seizure of, or destruction of, property. Similar to the ACA, section 12 of the Maritime Crimes Act 1999 (MCA), confers upon a ship master and crew certain powers of search of a person or baggage on a ship.

Arrest and detention are matters that strike at the heart of personal security and are impacted upon by various provisions of the ICCPR (articles 9 and 10) and the Bill of Rights (sections 22 to 24 inclusive). Authorisations to arrest and detain are included within the ACA, ITEPA and the MCA. Section 15 of the Aviation Crimes Act confers upon an aircraft commander certain powers of restraint and forced disembarkation. Similarly, section 11 of the Maritime Crimes Act authorises a ship captain to detain and surrender a person who commits an offence relating to ships (offences under section 4 of that Act). Section 10(2)(a), (c) and (g) of the International Terrorism (Emergency Powers) Act conferring powers upon police (and military acting as an aid to the police) to restrict entry and

require the evacuation of premises. Although the latter provisions may not be the same as ‘detention’, they do otherwise impact upon personal security and freedom of movement and will therefore be considered.

9.2.1 *Defining the Rights and Freedoms*

Rishworth’s four-step application of the New Zealand Bill of Rights first asks whether the provisions identified establish a limit(s) upon rights. It is necessary, in doing so, to define the rights involved and demonstrate that they operate in the circumstances to which the identified provisions apply. In plain terms, the questions to ask are (1) what is the scope of the freedom from unreasonable search and seizure; and (2) what is the scope of the freedom from arbitrary detention and the rights that flow from one’s arrest or detention?

9.2.1(a) *Freedom from unreasonable search and seizure.* In very simple terms, this freedom does not prohibit the search and seizure of a person or of premises or other items within the possession or control of a person (e.g., vehicles, lockers, bags, correspondence, and the like). The freedom prohibits the *unreasonable* search and seizure of the person or those things. Thus, reflecting Butler’s analysis of rights, the human right in question involves a ‘definitional balancing’ (whereby a right - by its very expression - envisages and permits a limitation upon its content and effect).⁵¹

The right under section 21 of the NZBORA incorporates two important developments from the traditional common law notions of ‘unreasonableness’ and ‘search’. Section 21 is broader in its application

⁵¹ Butler A, “Limiting Rights”, (2002) 33 *Victoria University of Wellington Law Review* 537, 541-544.

than the common law protection of property rights, instead including the protection of “those values or interests which make up the concept of privacy”.⁵² Thus, in general terms, section 21 will be triggered by the invasion of a reasonable expectation of privacy.⁵³ The second distinction to be made between the common law and Bill of Rights protection is in the determination, and consequences of, whether a search and seizure is ‘unreasonable’. Like the common law, this question is ultimately dependent upon the *actual* exercise of a search and/or seizure. Reasonableness, as concluded by the New Zealand Court of Appeal in *R v Jeffries*, can only be assessed in light of the facts and circumstances of a particular case.⁵⁴ Unlike the common law, however, illegality is not the touchstone of unreasonableness. In plain words, an illegal search will not necessarily invalidate that search, if it is exercised reasonably.⁵⁵

Albeit brief, this definition of the freedom from unreasonable search and seizure exposes an important limit upon the ability of this thesis to examine the provisions of New Zealand’s counter-terrorist legislation identified. Determining whether a search is unreasonable will ultimately depend upon the facts and circumstances of each particular case. The most that can be considered here, it is posited, is whether the legislative provisions are framed in such a way that they exclude the exercise of a reasonable search. The position is almost identical in the case of the International Covenant on Civil and Political Rights, which prohibits the

⁵² *R v Jeffries* [1994] 1 NZLR 290, 319.

⁵³ Rishworth, above n 35, 421.

⁵⁴ Above n 52, 306. See also Rishworth, *ibid*, 434.

⁵⁵ Rishworth, *ibid*, 434-435. See also *R v Jeffries*, above n 52, and *R v Grayson and Taylor* [1997] 1 NZLR 399, 405.

“arbitrary” or unlawful interference with a person’s privacy, their family, home or correspondence.⁵⁶ This thesis restricting itself to the analysis of legislative provisions, rather than the various and potentially unlimited manner in which they might be applied, all that can be said is that legislative authorisations to search must not be framed in a way that they require an arbitrary interference with privacy.

Formulating the latter points into a useful question for the analysis of New Zealand’s counter-terrorist legislation: *do the counter-terrorist provisions authorise search and seizure in such a way that they either exclude the exercise of a reasonable (and non-arbitrary) search?* If the answer is yes, then the provisions prima facie offend the ICCPR and NZBORA and will require further consideration. If, however, the provisions are not framed in such a way - if they permit a reasonable and non-arbitrary exercise of search - then that is all that can be expected of a legislative authority to search.

9.2.1(b) Freedom from arbitrary detention, and rights flowing from arrest or detention. The rights and freedoms associated with arrest and detention fall within two categories. First, there is the freedom from arbitrary arrest or detention guaranteed under section 22 of the NZBORA⁵⁷ and article 9(1) of the ICCPR.⁵⁸ Next are the specific rights triggered upon a person’s

⁵⁶ International Covenant on Civil and Political Rights, article 17(1). See also Conte, Davidson and Burchill, above n 7, chapter 7.

⁵⁷ Section 22 of the New Zealand Bill of Rights Act 1990 provides that “Everyone has the right not to be arbitrarily arrested or detained”.

⁵⁸ Article 9(1) of the International Covenant on Civil and Political Rights guarantees that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.

arrest or detention, codified under section 23 of the NZBORA⁵⁹ and the balance of article 9 of the ICCPR.⁶⁰ The rights triggered include the right to be informed of the reasons for one's arrest, and the prompt determination of bail.⁶¹

The most that can be done within this part of the chapter is to consider whether the counter-terrorist provisions in question either (1) exclude a non-arbitrary arrest or detention; and/or (2) exclude the exercise of any

⁵⁹ Section 23 of the New Zealand Bill of Rights Act 1990 provides:

23. Rights of persons arrested or detained
 - (1) Everyone who is arrested or who is detained under any enactment—
 - (a) Shall be informed at the time of the arrest or detention of the reason for it; and
 - (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
 - (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.
 - (2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.
 - (3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.
 - (4) Everyone who is—
 - (a) Arrested; or
 - (b) Detained under any enactment—for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.
 - (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

⁶⁰ Paragraphs 2 to 5 of article 9 to the International Covenant on Civil and Political Rights provide:

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

⁶¹ A comparison between the provisions of section 23 of the New Zealand Bill of Rights Act 1990 and article 9 of the International Covenant on Civil and Political Rights discloses that the rights triggered upon arrest and detention are not identical between documents. Ultimately, however, this is not a matter of import for the purpose of this chapter, since the examination limits itself to whether the provisions being examined exclude any of the rights.

rights triggered following arrest or detention.⁶² If they do not then, again, this is the most that can be expected of a statutory authorisation to detain or arrest.

9.2.2 Aviation Crimes Act 1972

Section 12(1) of the Aviation Crimes Act 1972 (ACA) authorises the search of a passenger or their baggage prior to boarding any aircraft in New Zealand,⁶³ but only with the passenger's consent.⁶⁴ Given that the search can only be undertaken by consent, it is concluded that the authority under section 12(1) of the ACA does not exclude the exercise of a reasonable and non-arbitrary search and is therefore compliant with the New Zealand Bill of Rights Act. Furthermore, subsection (4) sets out limitations on the power of search which promote a reasonable search. In the search of a person, the person cannot be required to remove anything more than a coat or similar item.⁶⁵ Female passengers must be searched by a female, unless the search is conducted by means of any mechanical or electronic device.⁶⁶ Section 12(5) also contains an authority to search, this time in respect of any cargo to be loaded onto any aircraft in New Zealand. Again, there is nothing in that authority preventing a reasonable and non-arbitrary search of the cargo.

⁶² As was done in the context of the freedom from unreasonable search and seizure, discussed above at 9.2.1(a) *Freedom from unreasonable search and seizure*.

⁶³ Such a search may be conducted by the New Zealand police, any aviation security officer (as defined by the Act), any customs officer, or any employee of the carrier or person authorised by the carrier: section 12(1).

⁶⁴ Failure to give consent allows the carrier to refuse to carry the person and/or their baggage: section 12(2).

⁶⁵ Section 12(4)(a).

⁶⁶ Section 12(4)(b).

Where a person refuses to consent to a search, this has the potential to permit a search without consent by a member of the New Zealand police under section 13 of the ACA. Section 13(1) authorises a police officer to conduct a search without warrant if the officer has reasonable grounds⁶⁷ to suspect that a crime against the ACA has been, is being, or is likely to be committed (hijacking, crimes in connection with hijacking, crimes relating to aircraft, or crimes relating to international airports).⁶⁸ The officer can detain the passenger for the purpose of that search and may take possession of any item listed in section 11(d) of the Act (firearms, explosives, dangerous weapons, and the like).⁶⁹ Section 13 does not demand arbitrary or unreasonable searches, nor does it demand arbitrary detention or purport to exclude rights upon arrest or detention.

Once passengers are onboard an aircraft, certain rights of search and detention are vested in the aircraft commander under section 15 of the ACA, who may request any member of the crew or any person onboard the aircraft to execute the search or detention.⁷⁰ Where an aircraft commander has reasonable grounds to suspect that a person has, or is about to, carry out certain acts,⁷¹ then he or she can take “such reasonable measures,

⁶⁷ Section 13(2) makes it clear that the fact of refusal to be searched cannot, by itself, constitute reasonable grounds for suspecting that a crime against the Act has been, is being, or is likely to be committed.

⁶⁸ See discussion on crimes against the Aviation Crimes Act 1972, Chapter Three at 3.6 Aviation Crimes Act 1972.

⁶⁹ Section 13(1)(b).

⁷⁰ This ‘delegation’ of the authority vested in the aircraft commander is contained in sections 15(2) and 17 of the Aviation Crimes Act 1972.

⁷¹ Those acts being (section 15(1) of the Act:

- (a) Anything which is an offence under the law of the country in which the aircraft is registered (not being a law of a political nature or a law based on racial or religious discrimination); or
- (b) Anything (whether an offence or not) which jeopardises or may jeopardise—
 - (i) The safety of the aircraft or of persons or property on board the aircraft; or

including restraint” as may be necessary to achieve certain prescribed ends.⁷² Any restraint must be discontinued once the aircraft ceases to be in flight, unless the aircraft commander has obtained the consent of the appropriate domestic authorities to continue the restraint and deliver the person to those authorities.⁷³ It is concluded that section 15 does not demand an arbitrary detention, not seek to exclude the triggering of rights upon detention, although the exercise of those rights is likely to be delayed due to the exigencies of air travel. Indeed, the provision contains mechanisms seeking to ensure that any restraint is proper, triggering the authority only where there are reasonable grounds to suspect certain activity and even then only permitting reasonable measures to be taken.

Finally, section 17 of the Act authorises the search of any person or baggage where the aircraft commander has reasonable grounds to suspect that a crime against the ACA has been, is being, or is likely to be committed. Section 17 also allows the seizure of any article found which could be used to effect or facilitate the commission of such a crime. Section 17, it is concluded, also complies with the NZBORA and ICCPR.

9.2.3 *Maritime Crimes Act 1999*

The Maritime Crimes Act 1999 confers upon the master of a New Zealand ship rights of search and delivery, similar to those conferred upon an

(ii) Good order and discipline on board the aircraft,

⁷² The measures taken by the aircraft commander must be reasonable and necessary for the following purposes (section 15(1) of the Act):

- (c) To protect the safety of the aircraft or of persons or property on board the aircraft; or
- (d) To maintain good order and discipline on board the aircraft; or
- (e) To enable the commander to disembark or deliver that person in accordance with subsection (4) or subsection (5) of this section.

⁷³ Section 15(3).

aircraft commander, although the powers of a ship master are much less than those of an aircraft commander. The first such distinction is that a ship master is only authorised to deliver a person to authorities where he or she suspects that a crime relating to ships⁷⁴ has occurred. The Act is otherwise devoid of any express authority to detain or restrain a person, whether following the commission of such a crime, or upon suspicion that an offence is being, or is likely to be, committed. Consideration of the NZBORA and ICCPR is therefore not necessary.

A limited right of search and seizure does, however, exist. Where the master of a ship believes on reasonable grounds that a crime against the MCA has been, is being or is likely to be committed on board the ship, section 12 of the Act allows the master or crew to search a person (and their baggage) where there are reasonable grounds to believe that he or she is involved in the offending.⁷⁵ Search of any baggage which is believed, on reasonable grounds, to contain any article that has been used or could be used to effect of facilitate the commission of a crime under the Act is also authorised.⁷⁶ Section 12 clearly imports the need for searches to be based upon reasonable grounds and does not purport to require arbitrary or unreasonable searches. It is concluded that the Maritime Crimes Act does not offend human rights.

⁷⁴ As set out in section 4 of the Act: see discussion in Chapter Three at 3.9 Maritime Crimes Act 1999.

⁷⁵ Section 12(2)(a) and (b).

⁷⁶ Section 12 (2)(c).

9.2.4 International Terrorism (Emergency Powers) Act 1987

Section 10(2) of the International Terrorism (Emergency Powers) Act 1987 confers upon police (and military acting as an aid to police) various powers where an international terrorist emergency is declared.⁷⁷ Although the powers conferred are not expressly those of detention or seizure, they are worth considering in brief. The powers under section 10(2) loosely fall within four categories. The first is the power to enter, and if necessary break into, any premises or place or vehicle which is within the area in which the terrorist emergency is occurring. Although this is a right of entry, and one that clearly impacts upon property rights, the power is not one that authorises investigatory search and seizure and does not, it is posited, impact upon human rights.⁷⁸ The power is presumably meant to allow counter-terrorist agents to enter and occupy premises or vehicles for the purpose of observation or to facilitate other aspects of a counter-terrorist operation.

The next category of authorisations concerns the ability of the police or military to direct and restrict the movement of persons. Although associated with security of the person, these powers do not appear to

⁷⁷ The declaration of an international terrorist emergency is discussed in Chapter Three at 3.8 International Terrorism (Emergency Powers) Act 1987.

⁷⁸ The distinction needs to be made between property rights versus human rights (the former not a matter within the scope of the New Zealand Bill of Rights Act 1990 or the International Covenant on Civil and Political Rights).

impact upon arrest and detention rights, but instead upon the freedom of movement. The relevant parts of section 10 provide:

Subject to this Act, any member of the Police may, for the purpose of dealing with any emergency to which this section applies, or of preserving life or property threatened by that emergency,-

- (a) Require the evacuation of any premises or place (including any public place), or the exclusion of persons or vehicles from any premises or place (including any public place), within the area in which the emergency is occurring:
- (c) Totally or partially prohibit or restrict public access, with or without vehicles, on any road or public place within the area in which the emergency is occurring:
- (g) Totally or partially prohibit or restrict land, air, or water traffic within the area in which the emergency is occurring.

These provisions clearly restrict the freedom of movement of persons made subject to directions issued under the provisions. In contrast, section 18(1) of the NZBORA and article 12(1) of the ICCPR guarantee that every person shall enjoy the freedom of movement. One must therefore consider, by application of Rishworth's Step 2, whether these limitations upon the freedom of movement are 'consistent' with the New Zealand Bill of Rights Act 1990 by application of section 5 of that Act. The author takes the view that this is a clear situation in which statutory limitations are justified under section 5. The objective of the provisions is a pressing and substantial one (dealing with an international terrorist emergency and preserving life or property threatened by that emergency). The provisions rationally pursue that objective, by reasonable means, that are proportionate to the objective. Proportionality is achieved by expressly limiting the powers for the purpose of dealing with any emergency under the Act, or of preserving life or property threatened by that emergency. Proportionality is also met through the strict time limitations applicable to the 'life' of a terrorist emergency (sections 6 to 8) and the consequent availability of the

powers.⁷⁹ It is posited that the powers are also in accord with the permissible limitations upon the freedom of movement expressed within article 12(3) of the ICCPR, allowing restrictions “which are provided by law, [and] are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others”.

The third category of powers relates to property rights, authorising police or the military to remove any type of vehicle⁸⁰ that is within the area in which an emergency is occurring or is impeding measures to deal with the emergency.⁸¹ Where there are reasonable grounds to believe that any property within the emergency area constitutes a danger to any person, that property may be destroyed.⁸² Again, these affect property rights, which are outside the scope of consideration within this thesis. It is likely, however, that those limitations upon property rights are justifiable by application of principles of necessity and proportionality.

The final power is one of requisition of property, somewhat akin to seizure, but outside the parameters of criminal procedure. The power of requisition relates to any property within an emergency area and, by virtue of the first sentence of subsection (2), is limited to achieving the purpose of dealing with the emergency or of preserving life or property threatened by the emergency.⁸³ As for the restrictions upon the freedom of movement, the author again concludes that the objective is sufficiently important and the means proportional to justify the limitation upon the freedom from

⁷⁹ Discussed in Chapter Three at 3.8 International Terrorism (Emergency Powers) Act 1987.

⁸⁰ Whether aircraft, hovercraft, ship, ferry, train or vehicle (section 10(2)(d) of the Act).

⁸¹ Section 10(2)(d).

⁸² Section 10(2)(e).

⁸³ Section 10(2)(f).

unreasonable search and seizure. It is even open to conclude that the provision does not ‘limit’ the freedom as such but merely authorises the ‘reasonable’ seizure of property (permissible within the expression of the freedom itself).

9.2.5 Summary

Although the three items of legislation examined contain provisions authorising (or relating to) search and seizure, and arrest and detention, it has been concluded that these provisions are not in breach of either the Bill of Rights or the International Covenant. The Aviation Crimes Act and Maritime Crimes Act include a number of authorisations to search and detain, none of which demand an arbitrary or unreasonable search or detention, nor exclude the operation of rights that are triggered when a person is arrested or detained. It has been concluded that this is the most that can be expected of authorising legislation. Notwithstanding this, there are mechanisms within the provisions directing that search and detention are to be conducted in a reasonable way and based upon reasonable grounds.

The International Terrorism (Emergency Powers) Act provides the police and military with emergency powers during an “international terrorist emergency”. Most of those powers impact upon property rights, rather than civil and political rights. Section 10(2)(a), (c) and (g) impact upon and limit the freedom of movement, although it has been concluded that this is consistent with both section 5 of the Bill of Rights and article 12(3) of the International Covenant. The authority to requisition property within an emergency area has likewise been concluded to be justified.

9.3 Privacy and Surveillance

Authorisations to intercept communications and attach tracking devices to people or property are to be found within the International Terrorism (Emergency Powers) Act 1987 (ITEPA) and amendments to other legislation effected through the Counter-Terrorism Act 2003 (CTA). As summarised in Chapter Three, section 10(3) of the ITEPA authorises the police to intercept private communications within an area in which an international terrorist emergency is occurring, with qualifying provisions concerning the use of such communications (sections 18 to 20 inclusive). Sections 7B, 8 and 26 of the CTA extend the ability of police to obtain warrants to intercept private communications relating to terrorist offences (by amending section 312 of the Crimes Act 1961). Section 27 of the CTA also amended the definition of “security” within the New Zealand Security Intelligence Service Act 1969, having implications upon the issuing of interception and seizure warrants. It will be relevant, in the examination of the latter interception capabilities, to consider the principles set out in the Telecommunications (Interception Capability) Act 2004. Finally, section 34 of the Counter-Terrorism Act 2003 authorises police or customs officers to obtain a warrant to attach a tracking device to any property or person where it is suspected that an offence has been, is being, or will be committed (by adding new sections 200A to 200O of the Summary Proceedings Act).

9.3.1 International Terrorism (Emergency Powers) Act 1987

The International Terrorism (Emergency Powers) Act (ITEPA) authorises the police⁸⁴ to intercept private communications⁸⁵ under section 10(3) of the Act. This authority is restricted by various qualifications. Firstly, private communications that may be subject to interception are only those communications in the area in which an emergency is occurring, with that authority only existing during the 'life' of the emergency.⁸⁶ Next, the interception must be for the purpose of preserving life that is threatened by an international terrorist emergency. Where a communication is intercepted, section 18 prohibits the subsequent disclosure of the contents of the communication (except in the performance of the police officer's duty under the Act). Private communications may be produced in evidence in court, so long as prior notice and disclosure is given,⁸⁷ and only in respect of proceedings concerning any offence related to the terrorist emergency.⁸⁸

In the author's view, these qualifications render the interference with privacy both reasonable and proportional. By application of the principle *generalalia specialibus non derogant*, the authority is not limited by the provisions of the Privacy Act, other than in the storage or subsequent

⁸⁴ This authority does not extend to members of the armed forces acting as an aid to the civil power: section 10(4) of the Act.

⁸⁵ Section 2 of the Act defines "private communications":

- (a) means a communication (whether in oral or written form or otherwise) made under circumstances that may reasonably be taken to indicate that any party to the communication desires it to be confined to the parties to the communication; but
- (b) does not include such a communication occurring in circumstances in which any party ought reasonably to expect that the communication may be intercepted by some other person not having the express or implied consent of any party to do so.

⁸⁶ Section 10(3) of the Act.

⁸⁷ Section 19 of the Act.

⁸⁸ Section 20 of the Act.

disclosure of the information.⁸⁹ Likewise, the authority appears to be entirely compatible with article 17 of the International Covenant and the international guidelines on reasonableness and proportionality.

9.3.2 Crimes Act 1961

Under the Counter-Terrorism Act 2003, section 312N of the Crimes Act 1961 was amended to make interception warrants available for the investigation of terrorism-related offences,⁹⁰ or conspiracy to commit such offences.⁹¹ By implied repeal, the issuing of such warrants is unaffected by the Privacy Act. Again, article 17 of the ICCPR is satisfied by the fact that section 312N is a statutory authority which does not itself authorise arbitrary interception.

On the question of reasonableness and proportionality, the author takes the view that this extension is both reasonable and proportional. In its report to Parliament, the Foreign Affairs, Defence and Trade Committee pointed to the fact that there is no express international requirement to intercept communications pertaining to terrorist offences, but argued that such a power is necessary to provide for the effective investigation of such offences.⁹² The interception of private communications, it explained, might be necessary “to prove certain elements of terrorist offences, such as

⁸⁹ See Chapter Five at 5.6 Counter-Terrorism and Privacy.

⁹⁰ “Terrorist offence” is defined under section 312A of the Crimes Act as any offence against sections 7 to 13 (including 13A) of the Terrorism Suppression Act 2002. Interestingly, this does not include the bioterrorism offences enacted under the Counter-Terrorism Act, resulting in new sections 298A, 298B and 307A of the Crimes Act, which make it an offence to cause disease or sickness in animals; contaminate food, crops, water or other products.

⁹¹ Sections 8 and 26 of the Counter-Terrorism Act 2003: see the report of the select committee, above n 2, 7. The amendment inserted subsections (c) (“a terrorist offence”) and (d) (“a conspiracy to commit a terrorist offence”) into section 312N of the Crimes Act 1961.

⁹² Above n 2, 8.

knowledge that an entity was designated”.⁹³ The author agrees entirely with this position. Counter-terrorism (including New Zealand’s contribution to achieving an effective international framework on counter-terrorism) is a pressing and substantial objective justifying proportional limitations upon rights in furtherance of that objective.⁹⁴

9.3.3 *New Zealand Security Intelligence Service Act 1969*

The next statutory amendment effected under the Counter-Terrorism Act 2003 is the definition of “security” within the New Zealand Security Intelligence Service Act 1969 (NZSIS Act). The definition, under section 2 of the latter Act, now includes “the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act”.⁹⁵ Section 4A of the NZSIS Act authorises the issuing of interception and seizure warrants for the purpose of detecting activities prejudicial to “security”. The grounds upon which the Minister in charge of the Security Intelligence Service and the Commissioner of Security Warrants⁹⁶ can issue interception warrants is thereby broadened to include the detection of activities, or the gathering of information, for the prevention of terrorist acts.⁹⁷

⁹³ Ibid.

⁹⁴ Chapter Five at 5.4.2 *Application of the Substantive Test under section 5*.

⁹⁵ Definition (d) of “security” under section 2 of the New Zealand Security Intelligence Act 1969.

⁹⁶ The Commissioner of Security Warrants is a former High Court Judge, appointed under section 5A of the Act by the Governor-General on the recommendation of the Prime Minister (following consultation with the Leader of the Opposition).

⁹⁷ This is through the combined affect of the section 2 definition of “security” and the first-stated grounds for the issuing of an interception warrant under section 4A(3) of the Act.

The first comment to make about this authority is conceptual, or moral, rather than legal. Professor Gross talks of national security as a pursuit which is both a duty and right of the State and in respect of which privacy can be validly interfered with.⁹⁸ Although not in the same terms, the Human Rights Committee has also spoken of individual privacy as being a relative matter - relative, that is, to the individual's membership of society and societal needs.⁹⁹ Both those positions are correct in the view of the author. Importantly, however, it is implicit in the view of the Human Rights Committee that this is a balancing Act. The national interest should not justify the imposition of an unchecked power of the State to spy on its people.¹⁰⁰

Applying these ideas to the legislative structure by which the Security Intelligence Service is able to obtain an interception warrant, the author concludes that there are proper checks and balances upon the issuing of such warrants. An interception warrant can only be issued by the Minister in charge of the Service *jointly* with the Commissioner of Security Warrants for a domestic interception warrant or by the Minister alone for a foreign interception warrant.¹⁰¹ Once satisfied that an interception warrant is necessary for the detection of, or gathering information relating to, activities prejudicial to security, the Director of Security must satisfy other factors: (1) the value of the information sought must justify the

⁹⁸ Gross E, "The Struggle of a Democracy Against Terrorism. Protection of Human Rights: The Right to Privacy Versus the National Interest – the Proper Balance" (2004) 37(1) *Cornell International Law Journal* 27, 31: discussed in Chapter Five at 5.6 Counter-Terrorism and Privacy.

⁹⁹ United Nations Human Rights Committee, General Comment No 6, *Article 17*, HRI/GEN/1/Rev.1 (1988), para 7.

¹⁰⁰ The concept of a "big brother" society. See Orwell G, 1984 (Harcourt Brace and Company, 1949).

¹⁰¹ Section 4A(1) and (2).

interception; (2) the information is not likely to be obtained by other means; and (3) the information is not privileged in proceedings in a court of law. These various restrictions make the legislation both reasonable and proportional.

9.3.4 Telecommunications (Interception Capabilities) Act 2004

A small point to note in the context of the interception of communications is that the Telecommunications (Interception Capabilities) Act 2004 requires telecommunications providers to be capable to intercept communications when required to do so under an interception warrant. Notably, the actual interception must be carried out “without unduly interfering with any telecommunications”, adding a further, practical, safeguard.¹⁰²

9.3.5 Tracking devices

The final statutory amendment under the Counter-Terrorism Act 2003 concerns the introduction of tracking devices, through the creation of new sections 200A to 200O of the Summary Proceedings Act 1957. Despite the number of provisions involved, their effect is relatively simple. What follows is an overview of the regime by which warrants to use tracking devices¹⁰³ may be made, as well as the special power to use a device without a warrant. Consideration will then be given to the question of

¹⁰² Telecommunications (Interception Capabilities) Act 2004, section 6(b).

¹⁰³ A tracking device is defined under section 200A of the Act as a device that, when installed in or on anything, can be used to ascertain the location of a thing or person, or whether something has been opened, tampered with or in some way dealt with.

checks and balances and the broad, rather than counter-terrorism-specific, nature of the authorising provisions.

9.3.5(a) The general regime authorising the use of tracking devices.

Section 200B of the Summary Proceedings Act allows an authorised officer to apply to the District or High Court for a tracking device warrant. The Counter-Terrorism Bill was initially to allow any “authorised public officer” to do so, allowing any officer of a government agency to apply for a warrant to enforce any law.¹⁰⁴ Agreeing with submitters that this would give an important power to too wide a scope of government officers, the Select Committee successfully recommended that the authority be limited to “authorised officers”, defining that term to include only the police and customs.¹⁰⁵

To issue a tracking device warrant, the Judge hearing the application must be satisfied:¹⁰⁶

- (a) that there are reasonable grounds to suspect that an offence has been, is being, or will be committed; and
- (b) that information that is relevant to the commission of the offence (whether or not including the whereabouts of any person) can be obtained through the use of a tracking device; and
- (c) that it is in the public interest to issue a warrant, taking into account the seriousness of the offence, the degree to which privacy or property rights are likely to be intruded upon, the usefulness of the information likely to be obtained, and whether it is reasonably practicable for the information to be obtained in another way.

¹⁰⁴ Counter-Terrorism Bill 2003, clause 34.

¹⁰⁵ Section 200A of the Summary Proceedings Act 1957. See the report of the Foreign Affairs, Defence and Trade Committee, above n 2, 11.

¹⁰⁶ The matters specified are those required to be within the belief of the officer making the application (section 200B(2)), with the presiding judge needing to be satisfied that those matters have been met (section 200C((1))).

Once a warrant is issued (upon terms directed by the Court),¹⁰⁷ the authorised officer can install, remove, maintain and monitor the tracking device and is permitted to take certain steps, including entry into premises, to do so.¹⁰⁸

9.3.5(b) The use of tracking devices without a warrant. More controversial is the ability for a police or customs officer to use a tracking device without a warrant. This authority exists where the officer believes on reasonable grounds that a court would issue a warrant (that is, that a Judge would be satisfied of the grounds identified above) and that, in all the circumstances, it is not reasonably practicable to obtain a warrant. The officer concerned, within 72 hours of installing a tracking device, must either remove it, cease monitoring it, or apply for a warrant to continue use of it.¹⁰⁹

A number of public submissions proposed that this authority was excessive and unnecessary, although the Select Committee disagreed, pointing to the occasional and inevitable need to react to emergencies.¹¹⁰ In what may have been an attempt to placate criticisms of the power, the Committee succeeded in introducing a requirement, whenever a tracking device is used without an accompanying warrant, for the officer to lodge a written report with the District or High Court on matters concerning the

¹⁰⁷ See section 200C of the Act. This includes the need for the court to direct the period for which a tracking device warrant is valid, which cannot be more than 60 days, without renewal. See section 200F on renewal of warrants.

¹⁰⁸ Section 200D of the Act.

¹⁰⁹ Section 200G of the Act.

¹¹⁰ See the report of the Foreign Affairs, Defence and Trade Committee, above n 2, 11-12.

installation of the device and the circumstances in which it came to be installed.¹¹¹

9.3.5(c) *Checks and balances.* The issue of checks and balances in the use of tracking devices was a matter of particular concern to the New Zealand Privacy Commissioner.¹¹² In the process of the issuing of warrants to use tracking devices, the Foreign Affairs, Defence and Trade Committee has pointed to the involvement of the courts (determining whether or not a warrant should be issued) as an adequate safeguard against abuse of the process.¹¹³ In the case of tracking devices used without a warrant, the checking mechanisms exist through sections 200G and 200H. Firstly, section 200G(8) provides civil and criminal immunity to an officer acting under the authority of section 200G, *unless* the officer “acts in bad faith or without reasonable care”. Secondly, the requirement to report to the court was pointed to by the Committee as a further judicial safeguard.¹¹⁴ Reports under section 200H are to be considered by a judge of the District or High Court, with that judge having the ability to refer a copy of the report, with any comments or recommendations, to the chief executive of the New Zealand Police or Customs, or to the responsible Minister.¹¹⁵

Concerning the use of tracking devices, both with and without a warrant, the Privacy Commissioner submitted to the Select Committee that an offence provision was an essential component of the scheme if it was to

¹¹¹ Section 200H(2) of the Act.

¹¹² See the *Report by the Privacy Commissioner to the Minister of Justice in relation to the Counter-Terrorism Bill*, 7 February 2003, available online at URL <<http://www.privacy.org.nz/people/countter.html>> at 10 March 2005.

¹¹³ Above n 2, 12.

¹¹⁴ Ibid.

¹¹⁵ Section 200H(4) and (5) of the Act.

fully protect privacy. In his report to the Minister of Justice, the Commissioner said:¹¹⁶

I support the scheme proposed in this bill for the authorisation of the use of tracking devices for law enforcement purposes. However, that scheme is incomplete without the accompaniment of an offence provision. Without an offence provision the law is silent in respect of the covert use of tracking devices by citizens against other citizens, notwithstanding the effect on privacy. The law does not explain what happens if an official fails to obtain a warrant or otherwise disregards or breaches the statutory scheme... An offence provision would also mean that public officials, whether authorised or not, could not use tracking devices for purposes not contemplated by this scheme (such as investigating behaviour which does not constitute an offence).

The majority of the Committee disagreed that such a provision was necessary, commenting (in what the author sees as an unjustifiably dismissive way) that “at this time, there is no evidence that the illegitimate use of tracking devices is a problem in New Zealand”.¹¹⁷ That view seems rather short-sighted and does not respond to the concerns of the Privacy Commissioner, although the Select Committee did urge the Government to consider the recommendation of the Privacy Commissioner in the near future.¹¹⁸ Although an offence provision in the nature of that recommended by the Commissioner was not enacted, it is notable that the Committee did recommend limiting an officer’s immunity from civil or criminal liability where acting in bad faith or without reasonable care.¹¹⁹

Still, the question remains as to whether the use of tracking devices is adequately balanced. Are the safeguards under the Summary Proceedings

¹¹⁶ Above n 112, part 3.8.

¹¹⁷ Above n 2, 12.

¹¹⁸ *Ibid.* There is currently no public indication that the Commissioner’s recommendation is under consideration.

¹¹⁹ *Ibid.*, 35.

Act sufficient? The author posits that they are not, in cases of the use of tracking devices both pursuant to a warrant and without a warrant.

9.3.5(d) Checks on the use of tracking devices under a warrant. The role of a judge in issuing a warrant certainly provides a check on whether a warrant should be issued in the first place, and it permits the issuing judge to make directions on the terms upon which a tracking device may be used. In doing so, a judge is required to determine whether the statutory criteria are met to allow for the use of tracking devices. The judge is also in a position to make whatever directions s/he deems appropriate for the proper use of the device, including the administration of justice and the maintenance of the right to privacy. At face value, then, the regime appears to be satisfactory.

However, the concern of the author is with what may occur *after* the issuing of the warrant. The terms of sections 200A to 200P of the Act do not guarantee that the use of a tracking device under a warrant will be undertaken in compliance with any directions accompanying the warrant. There is no mechanism within the Act to either censure or otherwise deal with an officer using a tracking device outside the terms directed, or to provide any redress to a person subjected to the use of a tracking device in breach of directed terms.¹²⁰ Ultimately, the courts may be able to provide a remedy by excluding evidence obtained in breach of directions under a

¹²⁰ Since criminal and civil liability under section 200G is restricted to liability following conduct in the use of tracking devices *without* a warrant. Although it has to be said that a police officer acting outside the directions of a court warrant may, instead, be subject to disciplinary proceedings under the Police Regulations 1992. One might also query whether a remedy for a victim of such interference might be able to claim remedies under the New Zealand Bill of Rights Act 1990 for an unreasonable search. The author views this as highly doubtful, since the *use* of a tracking device is neither a “search”, nor a “seizure”.

warrant. The courts appear powerless, however, to grant any remedy for the interference with a person's privacy (outside directed terms) where there are no subsequent proceedings relying upon evidence obtained as a result of the use of a tracking device. In an extreme case, for example, an officer could obtain a warrant for one purpose, use the tracking device for an entirely different purpose, with no consequences upon the officer or the State.

This is considerably problematic, since article 17 of the ICCPR requires States parties to ensure that the law protects individuals against arbitrary or unlawful interference with their privacy.¹²¹ The author concludes, in the absence of mechanisms to enforce compliance and authorise remedial action, that the tracking device regime is in breach of the International Covenant.

9.3.5(e) Checks on the use of tracking devices without a warrant. Arguing in favour of adequate checks in the use of tracking devices without a warrant (under section 200G), one would point to the fact that a police office must - if the warrant is not extended beyond 72 hours by a judicial warrant - file a written report with the District or High Court giving reasons for using the device without warrant and outlining its installation and use.¹²² One could also contend that the ability to use devices without warrant is a necessary reflection of the exigencies of law enforcement operations where there is no adequate opportunity to obtain a warrant, and point to the fact that a judge reviewing an officer's report can make

¹²¹ International Covenant on Civil and Political Rights, article 17(2).

¹²² Section 200H(2) of the Act.

recommendations (including any adverse comments if appropriate) to the chief executive of the police or customs, or to the responsible Minister. The author agrees that these do act as checks upon the use of devices without warrant. The problem, in the view of the writer, is that these checks have little weight behind them.

Section 200G(8) permits civil and criminal liability to follow where the use of tracking devices by an officer has been undertaken *in bad faith* or *without reasonable care*. However, this is a limited level of liability. Of particular concern to the author is the fact that the Crown is not required to act upon any recommendations made by a judge following a review of an officer's report. Again, this does not appear to provide adequate protection of individuals' freedom from arbitrary or unlawful interference with their privacy.

9.3.5(f) *Crown Law Office advice to the Attorney-General*. In her role under section 7 of the New Zealand Bill of Rights Act 1990, the Attorney-General sought advice from the Crown Law Office concerning any potential inconsistency between the Counter-Terrorism Bill and the Bill of Rights Act.¹²³ In the two letters of advice from the Solicitor-General's office to the Attorney-General, the use of tracking devices was the only matter identified as having an impact upon the NZBORA.¹²⁴ The advice of

¹²³ For further explanation of this function, see Chapter Four at 4.1.5(*de*) *Role of the Attorney-General*.

¹²⁴ Letters from Crown Counsel to the Attorney-General, "Counter-Terrorism Bill PCO4663/14 Our Ref: nATT114/1124(15)", 10 December 2002 and 11 February 2003.

the office was that the tracking device scheme to be created under the Bill:¹²⁵

...establishes a reasonable accommodation of law enforcement needs and reasonable expectations of privacy. The warrant regime is tightly circumscribed and while s 200G creates a warrantless tracking device power, that too is limited in scope and clearly available only in exigent-type situations.

That conclusion was arrived at by undertaking a similar analysis to that above. The critical difference, however, is that Crown Counsel did not give consideration to the question of checks and balances upon the potential abuse of the provisions by an officer. This, as suggested, is where the tracking device regime fails to satisfy section 5 of the NZBORA.

9.3.5(g) *The use of tracking devices beyond counter-terrorism.* A criticism made earlier in this chapter concerned the use of the Counter-Terrorism Act as the vehicle through which to enact generally applicable powers.¹²⁶ Without revisiting those criticisms, the author posits that the earlier points made are also applicable to the use of the Counter-Terrorism Act to provide police and customs with the authority to use tracking devices for the purpose of enforcing ordinary crimes.¹²⁷

9.4 Conclusion

This final chapter in the analysis of particular provisions of New Zealand's counter-terrorist legislation has considered a number of different rights and

¹²⁵ Ibid (11 February 2003), para 7.

¹²⁶ Discussed above at 9.1.6 *The Application of section 198B Beyond Counter-Terrorism.*

¹²⁷ A specific concern of the Special Rapporteur to the Sub-Commission on the Promotion and Protection of Human Rights, above n 50.

resulted in varying conclusions. In all cases, it has been concluded that the legislative provisions are valid at domestic law. The question of compatibility of the provisions with the International Covenant and international guidelines on counter-terrorism gives rise to different answers however.

The regime by which police may require information of a person under section 198B of the Summary Proceedings Act 1957 has been concluded to be 'valid' at domestic law by virtue of its statutory status and by application of section 4 of the Bill of Rights Act. The regime is, however, a step away from the long-held common law privilege against self-incrimination. Where section 198B operates in respect of a person that is arrested or detained, it is also 'inconsistent' with the NZBORA (to the extent that it does not meet the section 5 justified limitations test). It is thereby also inconsistent with the international guidelines on counter-terrorism and human rights.

The search, arrest and detention authorisations under the Aviation Crimes Act 1972, the Maritime Crimes Act 1999 and the International Terrorism (Emergency Powers) Act 1987 have all been concluded to be both reasonable and proportional. It has been noted that because only the actual use of those authorisations will determine compliance with human rights, all that can be expected of authorising legislation is that it is framed in a way that does not demand arbitrary or disproportionate conduct.

The provisions of the Summary Proceedings Act 1957, by which use can be made of tracking devices, are in the main reasonable and proportionate. The legislative regime does not, however, adequately cater

for the event in which directions under warrants to use devices are breached, or where the use of a device without a warrant has been arbitrary or unreasonable. The current lack of compliance and remedial provisions renders the tracking device scheme in breach of both the International Covenant on Civil and Political Rights and the international guidelines on counter-terrorism and human rights.

Finally, this chapter has addressed and criticised the use of the Counter-Terrorism Act 2003 as a vehicle through which to enact generally applicable law enforcement mechanisms. The amendment of the Summary Proceedings Act 1957 to include sections 198B (provision of information to access computer data) and 200A to 200P (tracking devices) are applicable to the investigation of any criminal offending punishable by imprisonment, rather than terrorist-related offending. It has been concluded that this is both politically unsound and in breach of the international guidelines on counter-terrorism.

Chapter 10

Conclusion

The question posed in this thesis was whether the legislative means by which New Zealand has implemented its international counter-terrorism obligations comply with its domestic human rights legislation and the International Covenant on Civil and Political Rights. The answer is a mixed one although, broadly speaking, New Zealand's counter-terrorist legislation is compliant with domestic and international human rights, with occasional but important breaches of international human rights law and international guidelines on counter-terrorism.

Counter-Terrorism

New Zealand is a party to all twelve of the principal international conventions on anti-terrorism and, as a member of the United Nations, it is also bound by the obligations and directions of the Security Council on the issue of countering terrorism. It is similarly guided by the principles and recommendations enumerated within resolutions of the United Nations General Assembly and Commission on Human Rights. As a responsible international actor, whose domestic national interests rely upon the maintenance of a peaceful, secure, and free-functioning international society, New Zealand's implementation of its international counter-terrorist obligations is important not only to its compliance with those obligations but also to the promotion of its own interests.

The international counter-terrorist obligations upon New Zealand have, over time, prompted it to enact six items of legislation, including regulations made under the United Nations Act 1946. Also considered within this thesis has been the International Terrorism (Emergency Powers) Act 1987. While the latter legislation was not enacted for the purpose of implementing New Zealand's international obligations, it nevertheless forms an integral part of New Zealand's legislative counter-terrorist framework. The New Zealand Parliament is about to consider further reform to this framework, under the Terrorism Suppression Amendment Bill (No 2) 2004, seeking to extend current designations of terrorist entities until a review of the principal Act has been undertaken, and making consequential changes to the principal Act. Terms of reference are currently being drawn up for the Foreign Affairs, Defence and Trade Committee to undertake this review - which is to consider those provisions of the Terrorism Suppression Act 2002 that implement New Zealand's obligations under United Nations Security Council Resolution 1373 (2001). The Select Committee is to undertake its review during the course of 2005 and present a report to the House by 31 December 2005.

General Principles on the Interface between Counter-Terrorism and Human Rights

Five basic principles set the stage for the subsequent examination of New Zealand's counter-terrorist legislation. Firstly, terrorism adversely impacts upon international peace and security, international relations, States' territorial integrity and the enjoyment and development of rights. These features are integral to the functioning of a democratic society and, as such,

the establishment of a legislative regime to combat and suppress terrorism is *prima facie* a substantial and pressing objective in a free and democratic society (whether for the purpose of combating specific threats to New Zealand or contributing to the international anti-terrorist framework).

Secondly, and notwithstanding the importance of counter-terrorism, it is clear that counter-terrorist legislation must comply with human rights. This is a requirement of domestic law (to a qualified extent), and also necessary for New Zealand to remain compliant with its obligations under the International Covenant on Civil and Political Rights (ICCPR) and its membership of the United Nations. Compliance with human rights has been advocated by both the United Nations General Assembly and Commission on Human Rights. Significantly, the Security Council has directed under Resolution 1456 (2003) that States must ensure that measures taken to combat terrorism comply with all their obligations under international law, including international human rights in particular.

The third principle is that when talking of the need to ‘comply with human rights’ it must be remembered that human rights instruments themselves cater for the limitation of rights in certain circumstances. In the case of the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993, this is through section 5 of the NZBORA, or through the particular expression of the right (the freedom from *unreasonable* search and seizure, for example). Section 5 of the NZBORA sets out a ‘justified limitations’ test, although it is subject to section 4 of the Act which protects an ‘unjustified’ limitation from invalidation by the courts. In the case of the Privacy Act 1993, interference with privacy is

only permissible to the extent that such interference either complies with the information privacy principles (section 6 of the Privacy Act), or is expressly authorised under an enactment which prevails by application of the principles of *implied repeal* or *generalia specialibus non derogant*. In the case of the ICCPR, there is no general limitations clause. In the absence of invoking article 4 of the Covenant to claim that a state of emergency exists (which New Zealand has not done), the limitation of rights is provided for within the particular expression of rights.

The next matter to bear in mind concerns the different treatment within the ICCPR of derogable and non-derogable rights. The author has posited that this represents a false dichotomy and that great care should be taken in asserting that any right is absolute. While some rights are more significant than others, no right is absolute (other than, perhaps, the prohibition against torture). Even with what is regarded as the most fundamental human right, the right to life, permissible limitations are commonly recognised to exist – for example, the taking of someone’s life is justified if that occurs in the defence of one’s self or another and is a proportional response in the circumstances.

Finally, the section 5 justified limitations test within the New Zealand Bill of Rights Act has been concluded to be consistent with international guidelines on meeting the challenges of counter-terrorism in compliance with human rights. The various international guidelines’ advocacy of necessity, proportionality, legality, unfettered discretion, rational connection, and minimal impairment find favour with the section 5 test. Each of those factors are reflected within the justified limitations test set

out by the Supreme Court of Canada in *R v Oakes* and adopted by the New Zealand High Court in *Solicitor-General v Radio New Zealand Ltd* and subsequent relevant case-law. Thus, if a statutory provision is justifiable under section 5, it is also consistent with international guidelines on counter-terrorism and human rights. Although the international guidelines are in the form of 'soft law' recommendations and principles, rather than binding norms, the high degree of consistency between the various sources of the guidelines makes them highly influential. They represent the standards generally accepted by international society as being applicable to countering terrorism in democratic States.

**Limiting Rights in the Pursuit of Counter-Terrorist Objectives:
Domestic Human Rights and International Law Implications**

Reflecting upon the application of the New Zealand Bill of Rights Act, the starting point is that - in the abstract - counter-terrorist legislation that imposes limitations upon rights and freedoms is capable of being 'not invalid' under the NZBORA and therefore 'good law' from the perspective of a domestic court. This will arise in two situations. The first is where the legislation is found to be 'consistent' with the Bill of Rights by application of section 5 of the Act. As discussed, this will also render the legislation consistent with the international guidelines on counter-terrorism and human rights. The second situation in which legislation will be 'not invalid' under the Act is where the legislation is 'inconsistent' with the Bill of Rights (by application of section 5), but otherwise 'not invalid' by application of section 4. In this event, the legislation is not consistent with the international guidelines on counter-terrorism and human rights.

Various examples exist of limiting provisions within New Zealand's counter-terrorist legislative framework that are 'consistent' with the Bill of Rights under section five. The power to restrict public access within an area in which an "international terrorist emergency" is occurring (under section 10(2)(c) of the International Terrorism (Emergency Powers) Act 1987) has been concluded to represent a justified limitation upon the freedom of movement. Section 10(2)(f) of the latter Act, which authorises the requisitioning of property within an emergency area, is likewise a justified limitation upon the freedom from unreasonable search and seizure. The Prime Minister's power under the Act to issue media gags on information or material concerning an international terrorist emergency has also been concluded to be a justified limitation upon the freedom of expression, when viewed against the anticipated justiciability of such decisions to judicial review. Next, the operation of section 198B of the Summary Proceedings Act 1957 (inserted under the Counter-Terrorism Act 2003) to the investigation of offences under the Terrorism Suppression Act 2002, is viewed as a justified limitation upon the right to silence - although section 198B is broader in its authority than the investigation of terrorist-related offending. Finally, the prohibitions, and corresponding offences, against the participation in, recruiting for, and financing of terrorist entities (sections 8, 12 and 13 of the Terrorism Suppression Act 2002) is seen as a justified limitation upon the freedom of association.

At the other end of the scale, two statutory counter-terrorist provisions have been concluded to be 'not invalid' under the Bill of Rights, but by virtue only of the operation of section 4 of that Act. Firstly, it has been

concluded that it is not a justifiable limitation upon the right to silence for section 198B of the Summary Proceedings Act 1957 to be capable of operating in the investigation of any offences punishable by imprisonment. Next, and significantly in the author's view, sections 38 and 39 of the Terrorism Suppression Act 2002 (preventing the disclosure of classified information upon which a terrorist designation is made) is seen as an unjustifiable limitation upon natural justice (*audi alteram partem*) but nevertheless 'not invalid' by application of section 4. The significance of these findings is that, although the provisions remain 'good law' as far as the New Zealand courts are concerned, they violate the international standards on counter-terrorism and human rights since they do not satisfy section 5 of the Bill of Rights.

The final point to note concerning the application of the NZBORA is that, where counter-terrorist legislation is found to be 'not invalid' under the Act, it might nevertheless be contrary to the ICCPR (depending upon the expression of rights in the latter document). This occurs in one instance only, concerning the 'protection' of classified security information in the designation process under the Terrorism Suppression Act. The relevant provisions are considered to be 'not invalid' by application of section 4 of the Bill of Rights, but otherwise inconsistent with the rights to natural justice. They conflict, however, with article 14(1) of the International Covenant and find no saving provision under that instrument.

On the subject of privacy, this thesis has proposed that counter-terrorist provisions - to comply with the ICCPR and the international guidelines on counter-terrorism and human rights - must not permit arbitrary interference

with privacy, they must protect the individual against arbitrary or unlawful interference, and any interference must be reasonable and proportional. In all but once instance, the relevant statutory provisions examined have been concluded to be in compliance with those requirements. The authorisation to intercept communications under section 10(3) of the International Terrorism (Emergency Powers) Act 1987 is reasonable and adequately restricted. The authorisation to obtain interception warrants under sections 312N of the Crimes Act 1961 for the investigation of terrorist-related offences is also reasonable and adequately restricted. Finally, the ability of the Security Intelligence Service to obtain interception warrants under section 4A of the New Zealand Security Intelligence Service Act 1969 (for the detection of activities, or gathering of information, for the prevention of terrorist acts) has been concluded to be reasonable and adequately restricted. In contrast, the regime under sections 200A to 200P of the Summary Proceedings Act 1957 (by which tracking devices may be used) does not adequately safeguard the individual against arbitrary or unlawful interference with privacy.

Turning to the International Covenant on Civil and Political Rights, there are two propositions made by the author concerning the manner in which any breach of the ICCPR might be dealt with. Applicable to both propositions is the idea that, notwithstanding a breach of the ICCPR, such a breach might in exceptional circumstances be rendered 'otherwise acceptable' - either at international law or from a policy perspective. The first proposition is that this may be the case where the legislative provision (or, more usually, a specific act or omission) can be justified by operation

of other international law principles. For example, the application of the defence of distress (under the principles of State responsibility) can act to legitimise the taking of a terrorist's life in defence of one's self or another in reliance upon the right to self-defence under section 48 of the Crimes Act 1961.

The second, more controversial, proposition is that a violation of the International Covenant might be rendered 'acceptable' if the statutory provision limits rights in a manner justifiable under section 5 of the NZBORA (and, as such, in a manner consistent with the international guidelines on counter-terrorism and human rights). The latter proposition is more controversial than the first because of the 'soft law' nature of the international guidelines. Nevertheless, it is difficult to see the Human Rights Committee making an adverse comment upon a limitation on rights that - notwithstanding a conflict with the ICCPR - is framed in such a way that it is in pursuit of a pressing counter-terrorist objective, necessary to that end, is proportional, in legal terms, providing a discretion with adequate safeguards, is rationally connected to the achievement of the objective, and impairs the right to the most reasonably limited extent. Such an approach may well be deemed acceptable by the Human Rights Committee applying a concept akin to the 'margin of appreciation', albeit that the Committee does not formally recognise the notion of a margin of appreciation. At worst, such a limitation would stand as one grounded upon a justifiable policy reflecting international standards. The advocated reform of the terrorist designation process under the Terrorism Suppression

Act would, while still technically breaching the ICCPR, be a candidate for justification on this basis.

Conclusions on New Zealand's Counter-Terrorist Legislation

Returning to the thesis question, are the legislative means by which New Zealand has implemented its international counter-terrorism obligations compliant with its domestic human rights legislation and the International Covenant on Civil and Political Rights? In the main, they are. Of the six extant counter-terrorism statutes (in other words, excluding the now expired terrorism regulations), tensions between terrorism and human rights are only felt under the International Terrorism (Emergency Powers) Act 1987, the Terrorism Suppression Act 2002 and the statutory reforms enacted under the Counter-Terrorism Act 2003. In a number of cases, the other items of legislation either do not effect a limitation upon rights and freedoms contained within the NZBORA and ICCPR, or only effect limitations consistent with a qualified expression of the right. In the case of the Aviation Crimes Act 1972, for example, the authority to search a passenger and his or her baggage under sections 12 and 13 of the Act is restricted in such a way that they only authorise *reasonable* search and seizure.

Furthermore, in most of the instances where a conflict between counter-terrorist provisions and the NZBORA have been perceived to exist, these perceived tensions are resolved by the ability to justify the limitations under section 5 of the Bill of Rights Act. These instances have been identified above, relating to: sections 10(2)(c), 10(2)(f), 14 and 15 of the International Terrorism (Emergency Powers) Act; sections 8, 12, 13 and

13A of the Terrorism Suppression Act; and section 198B of the Summary Proceedings Act (in its operation to counter-terrorist investigations). Likewise, most strains between counter-terrorism and the right to freedom from interference with one's privacy (in the context of both the Privacy Act 1993 and the ICCPR) are resolved through the legislative provisions imposing reasonable limitations upon the right and adequately protecting against the arbitrary, unreasonable or disproportionate interference with privacy. This has been found to be the case under section 10(3) of the International Terrorism (Emergency Powers) Act, section 312N of the Crimes Act 1961 and section 4 of the New Zealand Security Intelligence Service Act.

There are, however, three specific and two general concerns about New Zealand's counter-terrorist legislation that see New Zealand acting in breach of international law and the international guidelines on counter-terrorism and human rights, and therefore call for legislative reform. The first two specific concerns relate to provisions that limit rights under the NZBORA and are saved only by operation of section 4 of the Act. Of those, the first is the protection afforded to classified security information under the Terrorism Suppression Act designation process. This is neither justifiable under section 5 of the NZBORA, nor within the expression of rights under article 14 of the ICCPR, so that the relevant provisions constitute a breach of the ICCPR that cannot be justified at law or in policy. In the case of requests for information made under section 198B of the Summary Proceedings Act (where made subsequent to a person's arrest), the application of this provision outside the scope of an identified

and pressing objective fails to satisfy the section 5 test as a justified limit upon section 23(4) of the NZBORA, but is ‘not invalid’ by operation of section 4. While this does not breach the ICCPR, since there is no comparable provision in the Covenant to section 23(4) of the NZBORA, it fails to comply with the international guidelines on counter-terrorism and human rights. The final specific concern relates to the use of tracking devices under sections 200A to 200P of the Summary Proceedings Act. In this case, the lack of safeguards against the arbitrary or unlawful interference with privacy by use of tracking devices renders the regime both in breach of article 17 of the ICCPR and the international standards on counter-terrorism and human rights.

Finally, the general concerns mentioned relate to New Zealand’s use of its international counter-terrorist obligations as an excuse to extend State powers beyond counter-terrorism. The enactment of sections 198B and 200A to 200P of the Summary Proceedings Act (requests for information and tracking devices) was said, in the introduction to the Counter-Terrorism Bill, to reflect “the need for New Zealand to ensure we have a comprehensive legislative framework in place that reflects the new, more dangerous era of international terrorism”. However, those provisions are not limited to countering terrorism but instead have the potential to apply to the investigation of any offence punishable by imprisonment. These two features are thus contrary to the international guidelines on counter-terrorism and human rights, which express that counter-terrorism measures should directly relate to terrorism and terrorist acts, not to acts that are ordinary crimes.

The balance between the *terror* capable of being induced through terrorist acts and the *tyranny* of the State over its people is one that is generally well-struck within New Zealand's counter-terrorist legislative framework. There remain, however, instances of unjustified and potentially excessive State powers that call for reform if New Zealand wishes to comply with the International Covenant on Civil and Political Rights and with international guidelines on counter-terrorism.

One final question remains: where to from here? The foregoing discussion has suggested that legislative reform should be undertaken where there are breaches of the International Covenant on Civil and Political Rights, or of the international guidelines on counter-terrorism and human rights. To that end, this thesis has proposed some of the more technical legislative amendments that could be made to achieve compliance. Is the Government likely to make such changes? What if it doesn't amend the law for the sake of compliance with human rights? What should the State do if legislating in the future on the subject of counter-terrorism?

It is impossible to say with any certainty whether the New Zealand Government will adopt the reforms advocated in this thesis. To attempt to do so would be highly speculative and beyond the aim of this thesis. Some comments can be made, however, on the potential consequences of not reforming the identified areas of concern. Potential consequences can be addressed at four levels: internal judicial responses; individual complaints to the Human Rights Committee; periodic reporting to the Committee; and diplomatic relations and credibility.

Internal judicial responses and individual complaints to the Human Rights Committee are consequences that will arise through the consideration of the particular application of counter-terrorist provisions, where an individual or designated entity complains of this. Although it has been concluded that all legislative provisions are either 'consistent' with section 5 of the Bill of Rights Act or 'saved' under section 4 of the Act, the latter event does not preclude action by the New Zealand judiciary. In the case of requests for information under section 198B of the Summary Proceedings Act (where such requests are made outside the scope of counter-terrorist investigations or other pressing and substantial objectives), the New Zealand courts would be entitled to make a judicial indication of incompatibility. The same is true of the operation of sections 38 and 39 of the Terrorism Suppression Act in their protection of classified security information. In the latter instance, since this also involves a breach of the ICCPR, an individual could complain directly to the United Nations Human Rights Committee (after having exhausted local remedies). It is anticipated that the Committee would find these provisions in breach of article 14(1) of the Covenant and therefore demand New Zealand to provide effective remedies for the breach and consider legislative amendment to prevent further breaches.

Independent of individual complaints, the monitoring function of the Human Rights Committee under the Covenant will require New Zealand to lodge further periodic reports on the status of the enjoyment of Covenant rights in New Zealand. As a matter specifically mentioned by the Committee in its comments to New Zealand's most recent report, the

Committee will no doubt look to examine the question of the compliance of counter-terrorist legislation with the ICCPR. New Zealand will need to account for any violations of the Covenant and any adverse observations made by the Committee will be published and thereby made available in the public arena. As such, this also triggers the issue of diplomatic relations and credibility. As a State that has repeatedly advocated compliance with human rights at the diplomatic level, adverse comments and decisions against New Zealand are likely to reflect badly upon the State. It will certainly impact upon the credibility of the State to advocate human rights compliance by others.

Finally, some comment should be made about the prospect of the New Zealand State enacting further counter-terrorist legislation. Regrettably, this thesis has argued more than once that the advice provided to the Attorney-General on the question of compliance of proposed counter-terrorist legislation with the NZBORA has been inadequate. This is of concern not just to the question of legislating on the subject of terrorism, but it calls into question the efficacy of section 7 of the Bill of Rights and the wisdom of retaining Parliamentary sovereignty under section 4 of the Act. As for any other examination of Bills, the author advocates a careful application of section 5 when advising the Attorney-General on the 'consistency' of potential statutory provisions with the Bill of Rights. By doing so, the State can be confident that it will also comply with the international guidelines on counter-terrorism and human rights. The State should also further consider whether the legislation might be in breach of the ICCPR, although it has been suggested in this thesis that non-

compliance could be justified on a policy basis so long as section 5 and the international guidelines are complied with.

Bibliography

BOOKS, ARTICLES AND PAPERS

Books

Andreu-Guzmán, *Terrorism and Human Rights*, (International Commission of Jurists, 2002)

Arai-Takahashi Y, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002)

Bailey SH and Stephen H, *Civil Liberties: Cases and Materials* (Butterworths London, 2001)

Bergen P, *Holy War Inc. Inside the Secret World of Osama bin Laden* (Orion Publishing Group, 1998)

Brownlie I, *Principles of Public International Law* (6th edition, Oxford University Press, 2003)

Burrows JF, *Statute Law in New Zealand* (2nd ed, Butterworths, 1999)

Burrows JF, *Statute Law in New Zealand* (3rd ed, LexisNexis, 2003)

Burrows JF and Cheer U, *Media Law in New Zealand* (4th ed, Oxford University Press, 1999)

Conte A, *Security in the 21st Century: the United Nations, Afghanistan and Iraq*, (Ashgate Publishing Ltd, 2005)

Conte A, Davidson S and Burchill R, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*, (Ashgate Publishing Ltd, 2004)

Evans J, *Statutory Interpretation. Problems of Communication* (Oxford University Press, 1989)

Evans MD, *International Law* (Oxford University Press, 2003)

Evans MD, *Preventing Torture. A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment* (Clarendon Press, 1998)

Everitt A, *Cicero: The Life and Times of Rome's Greatest Politician*, (Random House Inc, 2001)

- Feldman D, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press, 2002)
- Fuller C, *International Terrorism* (Mason Crest Publishers, 2003)
- Gearty CA and Kimbell JA, *Terrorism and the Rule of Law: A Report Relating to Political Violence in Great Britain and Northern Island*, (Civil Liberties Research Unit, 1995)
- Ghandi PR, *The Human Rights Committee and the Right of Individual Communication* (Ashgate Dartmouth Publishing Ltd, 1998)
- Halsbury's *Laws of England* (4th ed)
- Harris DJ, *Cases and Materials on International Law* (5th ed, Sweet & Maxwell, 1998)
- Harris D and Joseph S (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, 1995)
- Hawes C and Rowe D (eds), *Essays in Commercial Law. A New Zealand Collection* (Centre for Commercial & Corporate Law Inc, 2003)
- Heere WP, *Terrorism and the Military. International Legal Implications* (TMC Asser Press, 2003)
- Howard RD and Sawyer RL (eds), *Terrorism and Counterterrorism. Understanding the New Security Environment (Revised and Updated)*, (McGraw-Hill Companies, 2003)
- Huscroft G and Rishworth P (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing Ltd, 2002)
- Jamal M, Taylor M and Stratas D, *The Charter of Rights in Litigation. Direction from the Supreme Court of Canada* (Ontario, Loose Leaf, 1990-)
- Joseph PA, *Constitutional and Administrative Law in New Zealand*, (2nd ed, Brookers, 2001)
- Lauterpacht H, *International Law and Human Rights* (Stevens, 1950)
- Leane G and von Togerstrom B (eds) *International Law in the South Pacific: Policies and Practices*, (Ashgate Publishing Ltd, in press)
- Martin FF and Tushnet MV, *The Rights International Companion to Constitutional Law* (Kluwer Law International, 1999)
- McGoldrick D, *From '9-11' to the 'Iraq War 2003'. International Law in an Age of Complexity* (Oxford and Portland, 2004)

McGoldrick D, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, 1990)

Ministry of Foreign Affairs and Trade, *New Zealand Handbook on International Human Rights* (Ministry of Foreign Affairs and Trade Publication, 1998)

Mulgan R, *Democracy and Power in New Zealand* (Oxford University Press, 1984)

Laquer W, *Terrorism* (Weidenfeld and Nicolson, 1977)

Lodge J (ed), *Terrorism. A Challenger to the State* (Robertson, 1981)

Morris E, Hoe A and Potter J, *Terrorism: Threat and Response* (Macmillan Press, 1987)

Oraa J, *Human Rights in States of Emergency in International Law*, (Clarendon Press, 1992)

Orwell G, *1984* (Harcourt Brace and Company, 1949)

Overy C and White C, *European Convention on Human Rights* (3rd ed, Oxford University Press, 2002)

Paccioco DM, Thomas EW, McLean J, Taggart M and McGrath JJ, *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation collection of papers, 1992)

Palmer G, *Unbridled Power. An Interpretation of New Zealand's Constitution and Government* (2nd ed, Oxford University Press, 1987)

Pettiford L and Harding D, *Terrorism. The New World War* (Arcturus Publishing, 2003)

Primoratz I, *Terrorism: The Philosophical Issues* (Palgrave Macmillan, 2004)

Rampton S and Stauber J, *Weapons of Mass Deception* (Penguin, 2003)

Rishworth P, Huscroft G, Optican S and Mahoney R, *The New Zealand Bill of Rights* (Oxford University Press, 2003)

Robertson, *Adams on Criminal Law* (Brookers Loose-Leaf)

Roth P, Thompson M, Mackay R and McCartney R, *Privacy Law and Practice* (Butterworths, Wellington, 1995)

- Schmidt AP and Jongman AI et al., *Political Terrorism* (Amsterdam and Transaction Books, 1988)
- Shaw M, *International Law* (5th ed, Cambridge University Press, 2003)
- Smith JE, *New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities*, Ian Axford New Zealand Fellowship in Public Policy, December 2003
- Strawson J (ed), *Law after Ground Zero* (Glass House Press, 2002)
- Thornton GC, *Legislative Drafting*, (4th ed, Butterworths, 1996)
- United Nations Department of Public Information, *Basic Facts About the United Nations* (United Nations Publication, 2000)
- Walker C, *The Prevention of Terrorism In British Law*, (Manchester University Press New York, 1992)
- Wasek-Wiaderek M, *Principle of "Equality of Arms" in Criminal Procedure Under Article 6 of the European Convention on Human Rights & its Function in Criminal Justice of Selected European Countries* (Leuven University Press, 2000).
- Wagh WL, *Terrorism and Emergency Management: Policy and Administration* (Dekker, 1990)
- White N (ed), *Collective Security Law* (Ashgate Dartmouth, 2003)
- Williams G, *A Bill of Rights for Australia* (UNSW Press, 2004)
- Williams G, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (UNSW Press, 2004)

Articles

- Allan J, "Moonen and McSense" [2002] *New Zealand Law Journal* 142
- Allan J, "The Operative Provisions - An Unholy Trinity" [1995] *Bill of Rights Bulletin* 79
- Allison G, "How to Stop Nuclear Terror" (2004) 83 *Foreign Affairs* 64
- Alvarez JE, "Hegemonic International Law Revisited" (2003) 97(4) *American Journal of International Law* 873
- Assimow M, "Delegated Legislation: United States and United Kingdom" (1983) 3(2) *Oxford Journal of Legal Studies* 253

- Atkey RG, "Reconciling Freedom of Expression and National Security" (1991) 41(1) *The University of Toronto Law Journal* 38
- Bantekas I, "The International Law of Terrorist Financing" (2003) 97(2) *American Journal of International Law* 315
- Bassiouni MC, "Terrorism, Law Enforcement and the Mass Media: Perspectives, Problems, Proposals" (1981) 72 *The Journal of Criminal Law and Criminology* 1
- Beltran X, "Applying RICO to Eco-Activism: Fanning the Radical Flames of Eco-Terror" (2001-2002) 29 *Environmental Affairs* 281
- Benvenisti E, "Margin of Appreciation, Consensus, and Universal Standards" (1999) 31 *International Law and Politics* 843
- Berman F, "International Treaties and British Statutes" (2005) 26 *Statute Law Review* 1
- Berns W, "Judicial Review and the Rights and Law of Nature" (1982) *The Supreme Court Review* 49
- Bishop WJ, "Law in the Control of Terrorism and Insurrection: The British Laboratory Experience" (1978) 42(2) *Law in Contemporary Problems* 140
- Bonner D, "Ireland v. United Kingdom" (1978) 27(4) *The International and Comparative Law Quarterly* 897
- Bowen ERP, "Jurisdiction over Terrorists who Take Hostages: Efforts to Stop Terror-Violence against United States Citizens" (1987) 2 *American University Journal of International Law and Policy* 153
- Brandon B, "Terrorism, Human Rights and the Rule of Law: 120 Years of the UK's Legal Response to Terrorism" (2004) *The Criminal Law Review* 981
- Brookfield FM, "Constitutional Law" [1992] *New Zealand Recent Law Review* 231
- Burke KC, "Secret Surveillance and the European Convention on Human Rights" (1981) 33(6) *Stanford Law Review* 1113
- Butler A, "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] *New Zealand Law Review* 43
- Butler A, "Limiting Rights", (2002) 33 *Victoria University of Wellington Law Review* 537
- Carswel, "Rights or Wrongs? The Human Rights Act in the Courts" (2005) 79 *Australian Law Journal* 36

- Cassese A, "The International Community's 'Legal' Response to Terrorism" (1989) 38 *The International and Comparative Law Quarterly* 589
- Charles CD, "The Constitutionality of the Intelligence Identities Protection Act" (1983) 83(3) *Columbia Law Review* 727
- Charney JI, "The Use of Force against Terrorism and International Law" (2001) 95 *American Journal of International Law* 835
- Clarke RV, "Situational Crime Prevention" (1995) 19 *Crime and Justice* 91
- Cohn M, "Human Rights: Causality of the War on Terror" (2002-2003) 25 *Thomas Jefferson Law Review* 317
- Colb SF, "Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence: (1996) 96(6) *Columbia Law Review* 1456
- Cole D, "Hanging with the Wrong Crowd: of Gangs, Terrorists and the Right of Association" (1999) *The Supreme Court Review* 203
- Conte A, "A Clash of Wills: Counter-Terrorism and Human Rights", *New Zealand Universities Law Review*, 20 (2003) 338
- Conte A, "Declarations of Inconsistency under the Bill of Rights. Part II: An 'effective remedy'?" (2003) 6 *Human Rights Law and Practice* 256
- Conte A, "From Treaty to Translation: The use of International Human Rights Instruments in the Application and Enforcement of Civil and Political Rights in New Zealand" (2001) 8 *Canterbury Law Review* 54
- Conte A, "Human Rights, Non-Parole Periods and Preventive Detention" (2004) *New Zealand Law Journal* 202
- Conte A, "International Reflections on Civil and Political Rights in New Zealand", *The Canterbury Law Review*, (2002) 480
- Conte A, "Marching in Time: The Impact of Human Rights on Military Discipline in New Zealand" [1997] 3 *Human Rights Law and Practice* 30
- Conte A, "Terror Meets Tyranny? The Interface Between Counter-Terrorism and Human Rights", *E Law - Murdoch University Electronic Journal of Law* Vol 9 No 3 (September 2002)
- Conte A, "The Application of Section 4 of the Bill of Rights Act 1990 to Subordinate Legislation" [1997] 3 *Human Rights Law and Practice* 146
- Conte A, "The Cost of Terror" [2001] *New Zealand Law Journal*. 412

- Conte A, "Tracking Devices, Search Warrants and Self-Incrimination" [2003] *New Zealand Law Journal* 235
- Conte A and Wynn-Williams S, "Declarations of Inconsistency under the Bill of Rights. Part I: Judicial Jurisdiction, Discretion or Obligation?" (2003) 6 *Human Rights Law and Practice* 243
- Corothers T, "Promoting Democracy and Fighting Terror" (2003) 82 *International Affairs* 84
- Culp MS, "Constitutional Law. Freedom of the Press: Restraints on Publication" (1931) 30(2) *Michigan Law Review* 279
- Currie RJ, "Charter Without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms" (2004) 27(1) *Dalhousie Law Journal* 235
- Damrosch LF, "Covert Operations" (1989) 83(4) *American Journal of International Law* 795
- Dinh VD, "Nationalism in the Age of Terror" (2004) 56(5) *Florida Law Review* 867
- Donnelly J and Howard RE, "Assessing National Human Rights Performance: A Theoretical Framework" (1988) 10(2) *Human Rights Quarterly* 214
- Dunworth T, "Public International Law" (2002) *New Zealand Law Review* 255
- Dunworth T, "Public International Law" (2004) *New Zealand Law Review* 411
- Elkind J, "The Optional Protocol: A Bill of rights for New Zealand", [1990] *New Zealand Law Review* 96
- Epstein DG, "The Police Role in Counterinsurgency Efforts" (1968) 59(1) *The Journal of Criminal Law, Criminology, and Political Science* 148
- Evans AE, "Aircraft Hijacking: What Is To Be Done?" (1972) 66(4) *American Journal of International Law* 819
- Evans J, "Questioning the Dogmas of Realism", 2001 *New Zealand Law Review* 145
- Evans JM, "Some Limits to the Scope of Natural Justice" (1973) 36(4) *The Modern Law Review* 439
- Ewing KD, "The Human Rights Act and Parliamentary Democracy" (1999) 62(1) *The Modern Law Review* 79

Fellman D, "Constitutional Rights of Association" (1961) *The Supreme Court Review* 74

Finnie W, "Rights of Persons Detained under the Anti-Terrorist Legislation" (1982) 45(2) *The Modern Law Review* 215

Finnie W, "The Prevention of Terrorism Act and the European Convention on Human Rights" (1989) 52 *The Modern Law Review* 703

Fitzpatrick J, "Jurisdiction of Military Commissions and the Ambiguous War on Terrorism" (2002) 96(2) *American Journal of International Law* 345

Franck TM, "Terrorism and the Right of Self-Defence" (2001) 95 *American Journal of International Law* 839

Franck TM and Lockwood BB, "Preliminary Thoughts Towards a Convention on International Terrorism" (1974) 68(1) *American Journal of International Law* 39

Ganor B, "Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?", online publications of the International Policy Institute for Counter-Terrorism, URL <<http://www.ict.org.il/articles/define.htm>> at 7 January 2005

Ganor B, "Security Council Resolution 1269: What it Leaves Out", 25 October 1999, web site of the International Policy Institute for Counter-Terrorism, URL <www.ict.org.il/articles/articledet.cfm?articleid=93> at 01/06/02

Gobbi M, "Treaty Action and Implementation", (2004) 1 *New Zealand Yearbook of International Law* 277

Golder B and Williams G, "The Tricky Problem of Defining Terrorism" *ON Line Opinion*, 11 March 2005, URL <<http://www.onlineopinion.com.au/view.asp?article=3226>>

Greenwood C, "International Law and the 'War Against Terrorism'", *International Affairs* 78, 2 (2002)

Gross E, "The Struggle of a Democracy Against Terrorism. Protection of Human Rights: The Right to Privacy Versus the National Interest – the Proper Balance" (2004) 37(1) *Cornell International Law Journal* 27

Gross L, "International Terrorism and International Criminal Jurisdiction" (1973) 67 *American Journal of International Law* 508

Gutierrez D, "Incarceration and Torture: The Self in Extremity" (1984) 6(3) *Human Rights Quarterly* 284

- Halperin MH and Hoffman DN, "Secrecy and the Right to Know" (1976) 40(3) 132
- Hartman JF, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision" (1985) 7(1) *Human Rights Quarterly* 89
- Hentof T, "Speech, Harm and Self-Government: Understanding the Ambit of the Clear and Present Danger Test" (1991) 91(6) *Colombia Law Review* 1453
- Hoffman RE, "Preparing for a Bioterrorist Attack: Legal and Administrative Strategies", 9(2) (2003) *Emerging Infectious Diseases* 241
- Honore T, "The Right to Rebel" (1998) 8(1) *Oxford Journal of Legal Studies* 34
- Hyndman P, "The 1951 Convention Definition of Refugees: An Appraisal with Particular Reference to Sri Lankan Tamil Applicants" (1987) 9(1) *Human Rights Quarterly* 49
- Inbau FE, "Should We Abolish the Privilege against Self-Incrimination?" (1999) 89(4) *The Journal of Criminal Law and Criminology* 1385
- Inbau FE, "Self-Incrimination: What Can an Accused Person be Compelled to Do?" (1999) 89(4) *The Journal of Criminal law and Criminology* 1329
- Jackson J, "The Right of Silence: Judicial Responses to Parliamentary Encroachment" (1994) 57(2) *The Modern Law Review* 270
- Jennings RY, "The Caroline and McLeod Cases", (1938) 32 *American Journal of International Law* 82
- Joseph PA, "Constitutional Law" [2000] *New Zealand Law Review* 301
- Kelly M, "Executive Excess v Judicial Process: American Judicial Responses to the Government's War on Terror" (2002-2003) 13(3) *Indiana International and Comparative Law Review* 787
- Kirby M, "Australian Law – After 11 September 2001" (2001) 21 *Australian Bar Review* 16
- Klug H, "The Rule of Law, War, or Terror" (2003) *Wisconsin Law Review* 365
- La Forest AW, "Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004) 37(1) *University of British Columbia Law Review*

- Lacovara PA, "Presidential Power to Gather Intelligence: The Tension between Article II and Amendment IV" (1976) 40(3) *Law and Contemporary Problems* 106
- Langbein JH, "The Historical Origins of the Privilege against Self-Incrimination at Common Law" (1994) 92(5) *Michigan Law Review* 1047
- Lee HP, "The Australian Security Intelligence Organisation: New Mechanisms for Accountability" (1989) 38(4) *The International and Comparative Law Quarterly* 890
- Linde HA, "'Clear and Present Danger' Reexamined: Dissonance in the Brandenburg Concerto" (1970) 22(6) *Stanford Law Review* 1163
- Lipman M, "The Protection of Universal Human Rights: The Problem of Torture" (1979) 1(4) *Universal Human Rights* 25
- Livingston S, "The House of Lords and the Northern Ireland Conflict" (1994) 57(3) *The Modern Law Review* 333
- Marks S, "Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights" (1995) 15(1) *Oxford Journal of Legal Studies* 69
- Michaelson C, "International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11" (2003) 25 *Sydney Law Review* 275
- Mundis DA, "The Use of Military Tribunals to Prosecute Individuals Accused of Terrorist Acts" (2002) 96(2) *American Journal of International Law* 320
- New Zealand Law Society, 'Delay changes to citizenship criteria, NZLS says', LawTalk, 14 February 2005, 5
- O'Donnell TA, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights" (1982) 4(4) *Human Rights Quarterly* 474
- Paccioco DM, "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] *New Zealand Law Review* 353
- Palmer G, "Human Rights and the New Zealand Government's Treaty Obligations" (1999) 29 *Victoria University of Wellington Law Review* 57
- Palmer M, "Counter-Terrorism Law", (2002) *New Zealand Law Journal* 456
- Pocar F, "Legal Value of the Human Rights Committee's Views" (1991-1992) *Canadian Yearbook of Human Rights* 119

- Pugh M, "Legal Aspects of the Rainbow Warrior Affair" (1987) 36(3) *The International and Comparative Law Quarterly* 655
- Quigley J, "Government Vigilantes at Large: The Danger to Human Rights of Kidnapping Suspected Terrorists" (1988) 10(2) *Human Rights Quarterly* 193
- Rankin M, "National Security: Information, Accountability, and the Canadian Security Intelligence Service" (1986) 36(3) *The University of Toronto Law Journal* 249
- Raskin MG, "Democracy versus the National Security State" (1976) 40(3) *Law and Contemporary Problems* 189
- Ratner SR, "Jus ad Bellum and Jus in Bello after September 11" (2002) 96(4) *American Journal of International Law* 905
- Richards DAJ, "Terror and the Law" (1983) 5(2) *Human Rights Quarterly* 171
- Rishworth P, "The Potential of the New Zealand Bill of Rights Act" [1990] *New Zealand Law Journal* 68
- Robison JB, "Protection of Associations from Compulsory Disclosure of Membership" (1958) 58(5) *Columbia Law Review* 614
- Rodner D, "Notes and Current Developments: The Impact of Australian Anti-Terrorism Legislation on Securities Regulation and the Authority of Market Regulators" (2004) 17 *Australian Journal of Corporate Law* 26
- Rogers L, "Federal Interference with the Freedom of the Press" (1914) 23(7) *The Yale Law Journal* 559
- Rosand E, "Security Council Resolution 1373, the Counter-terrorism Committee and the Fight against Terrorism" (2003) 97(2) *American Journal of International Law* 333
- Ross JM, "Limitations on Human Rights in International Law: Their Relevance to the Canadian Charter of Rights and Freedoms" (1984) 6(2) *Human Rights Quarterly* 180
- Rozakis CL, "Terrorism and the International Protected Persons in Light of the ILC's Draft Articles" (1974) 23(1) *The International and Comparative Law Quarterly* 32
- Ruddock P, "National Security and Human Rights" (2004) 9(2) *Deakin Law Review*

Salgado RP, "Government Secrets, Fair Trials and the Classified Information Procedures Act" (1988) 88(2) *The Yale Law Journal* 472

Sherrin C, "The Privilege Against Self-Incrimination in Regulatory Proceedings: Beginnings" (2004) 30 *Manitoba Law Journal* 315

Small D, "A Critique of the Terrorism Suppression Bill", available online at the ARENA website, URL <<http://www.arena.org.nz>> at 2 November 2002

Stavros S, "The Right to a Fair Trial in Emergency Situations" (1992) 41(2) *The International and Comparative Law Quarterly* 343

Stohl M, Carelton D, Lopez G and Samuels S, "State Violation of Human Rights: Issues and Problems of Measurement" (1986) 8(4) *Human Rights Quarterly* 592

Szasz PC, "The Security Council Starts Legislating" (2002) 96(4) *American Journal of International Law* 901

Tham JC, "Casualties of the Domestic 'War on Terror': A Review of Recent Counter-Terrorism Laws" (2004) 28(2) *Melbourne University Law Review*

Thomas K, "Beyond the Privacy Principle" (1992) 92(6) *Colombia Law Review* 1431

Tomuschat C, "Evolving Procedural Rules: The United Nations Human Rights Committee's First Two Years of Dealing with Individual Communications" (1980) 1 *Human Rights Law Journal* 249

Torres D, *Inter Arma Silent Leges: An Examination of the Legal Rights of American Citizens Detained as Enemy Combatants in the War on Terror*, (2003) 3 *The Journal of Philosophy, Science and Law*, URL <www.psljournal.com/archives/papers/interarma.cfm> at 25 January 2005

Treves T, "The UN Body of Principles for the Protection of Detained or Imprisoned Persons" (1990) 84(2) *American Journal of International Law* 578

Tudor P, "Secondary Legislation: Second Class or Crucial?", *Statute Law Review*, Volume 21, 149

Walker CP, "Prevention of Terrorism (Temporary Provisions) Act 1984" (1984) 47 *Modern Law Review* 704

Walker CP, "Terrorism and Criminal Justice – Past, Present and Future" (2005) *The Criminal Law Review* 55

Walker CP, "The Jellicoe Report on the Prevention of Terrorism (Temporary Provisions) Act 1976" (1983) 46(4) *The Modern Law Review* 484

Warbrick C, "The European Convention on Human Rights and the Prevention of Terrorism" (1983) 32 *The International and Comparative Law Quarterly* 82

Witten SM, "The International Convention for the Suppression of Terrorist Bombings" (1998) 92(4) *American Journal of International Law* 774

Yoo J, "War, Responsibility, and the Age of Terrorism" (2004) *Stanford Law Review* 793

Conference Papers

Berg, His Excellency the French Ambassador to Fiji, "Terrorism: The New International Challenge", presentation at the public workshop, *How Should Fiji Respond to the Threat of Terrorism?*, hosted by the Citizens' Constitutional Forum and the Fiji Human Rights Commission, 17 July 2004, Suva, Fiji.

Conte A, "Emerging Trends in Counter-Terrorism. The Interface Between International Security and the Maintenance of Human Rights", paper presented at the Society for Legal Scholars Annual Conference, International Subject Section *From 9/11 to the Iraq War*, 17 September 2003, Oxford, England

Conte A, "Inter-State Conflict to Counter Terrorist Threats: self-defence or aggression?", paper presented at the conference *Challenge of Conflict: International Law Responds*, Adelaide, Australia, February 2004

Conte A, "International Law and Terrorism", a paper presented at the Institute for International Research Conference *Analysing and Understanding Crucial Developments in Public Law*, 26 March 2002, Wellington

Conte A, "International Law and Terrorism: A New Zealand Perspective", a paper presented at the 10th Annual Meeting of the Australian & New Zealand Society of International Law, *New Challenges and New States: What Role for International Law?*, 14 to 16 June 2002, Australian National University, Canberra, Australia

Conte A, "Terror Meets Tyranny? The Interface Between Counter Terrorism and Human Rights", paper presented at the Australasian Law Teacher's Association Conference, *Law and Social Justice Interest Group*, 29 September to 2 October 2002, Murdoch University, Perth, Western Australia

Conte A, "The Role of the Military in Counter-Terrorist Operations. New Zealand Reflections", paper presented at the joint workshop of the Fiji Human Rights Commission and the Citizens' Constitutional Forum *How Should Fiji Respond to the Threat of Terrorism?*, Suva, Fiji, 17 July 2004

Conte A, "What is Terrorism? The Problem of Definitions", paper presented at the joint workshop of the Fiji Human Rights Commission and the Citizens' Constitutional Forum *How Should Fiji Respond to the Threat of Terrorism?*, Suva, Fiji, 17 July 2004

Davidson JS, "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee" (paper presented at a conference on the future of the New Zealand Constitution, Auckland, 20-21 August 1999)

Dunworth T, 'New Zealand's Legislative Responses to September 11', paper presented at the 10th Annual Meeting of the Australian and New Zealand Society of International Law, *New Challenges and New States: What Role for International Law?*, 16 June 2002, Australian National University, Canberra

Keith KJ, 'Application of International Human Rights Law in New Zealand', a paper given at the Judicial Colloquium on the Domestic Application of International Human Rights Norms in Georgetown, Guyana, 3-5 September 1996

Keith K, 'Terrorism, Civil Liberties and Human Rights', a paper presented at the 13th Commonwealth Law Conference 2003, (CR4) Terrorism: Meeting the Challenges / Finding the Balances, 13-17 April 2003

Richardson I, 'The Courts and the Public' (a discussion on the impact of new legislation on New Zealand's justice system), Sydney 25 November 1994

Rowe R, "Key Developments: Year of International Law in Review", A paper presented at the 10th Annual Meeting of the Australian & New Zealand Society of International Law, *New Challenges and New States: What Role for International Law?*, 15 June 2002, Australian National University, Canberra

Shameem S, "Tension Between Anti-Terrorism Laws and Human Rights", presentation at the public workshop, *How Should Fiji Respond to the Threat of Terrorism?*, hosted by the Citizens' Constitutional Forum and the Fiji Human Rights Commission, 17 July 2004, Suva, Fiji

Simpson S, "A Brief History of Terrorism in the South Pacific", presentation at the public workshop, *How Should Fiji Respond to the Threat of Terrorism?*, hosted by the Citizens' Constitutional Forum and the Fiji Human Rights Commission, 17 July 2004, Suva, Fiji

Smith M, "The UN Commission on Human Rights: Reflections on a Year as Chair" (paper presented at the Centre for International and Public Law seminar, Australian National University, Canberra, 31 August 2004)

Unwin G, "The Need for Anti-Terrorism Legislation in Fiji", presentation at the public workshop, *How Should Fiji Respond to the Threat of Terrorism?*, hosted by the Citizens' Constitutional Forum and the Fiji Human Rights Commission, 17 July 2004, Suva, Fiji

UNITED NATIONS MATERIALS

Commission on Human Rights

Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/81, 27 February 2002, E/CN.4/20018

Resolution 1994/46 of 4 March 1994, E/CN.4/RES/1994/46

Resolution 1995/43 of 3 March 1995, E/CN.4/RES/1995/43

Resolution 1996/47 of 19 April 1996, E/CN.4/RES/1996/47

Resolution 1997/42 of 11 April 1997, E/CN.4/RES/1997/42

Resolution 1998/47 of 17 April 1998, E/CN.4/RES/1998/47

Resolution 1999/27 of 23 April 1999, E/CN.4/RES/1999/27

Resolution 2000/30 of 20 April 2000, E/CN.4/RES/2000/30

Resolution 2001/37 of 23 April 2001, E/CN.4/RES/2001/37

Resolution 2004/44 of 19 April 2004, E/CN.4/RES/2004/44

Resolution 2004/87 of 21 April 2004, E/CN.4/RES/2004/87

Sub-Commission on the Promotion and Protection of Human Rights, Decision 2004/109 of 12 August 2004, E/CN.4/Sub.2/DEC/2004/109

Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2001/18 of 16 August 2001, E/CN.4/Sub.2/2001/18

Sub-Commission on the Promotion and Protection of Human Rights Special Rapporteur, *A Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, 11 August 2004, E/CN.4/Sub.2/2004/47

Sub-Commission on the Promotion and Protection of Human Rights
Special Rapporteur, *Progress Report on Terrorism and Human*, 27 June
2001, E/CN.4/Sub.2/2001/31

United Nations Office of the High Commissioner for Human Rights,
*Digest of Jurisprudence of the UN and Regional Organizations on the
Protection of Human Rights While Countering Terrorism*, September 2003,
URL <<http://www.ohchr.org/english/about/publications/docs/digest.doc>>
at 13 August 2004

General Assembly

Ad Hoc Committee Established by General Assembly Resolution 51/210,
*Report of the Ad Hoc Committee Established by General Assembly
Resolution 51/210 on a Draft Comprehensive Convention on International
Terrorism*, A/AC.252/2002/CPR.1 and Add.1, 1 February 2002

Resolution 217(III) of 10 December 1948, A/RES/3/217

Resolution 3034 (XXVII) of 18 December 1972, A/RES/27/3034

Resolution 31/102 of 15 December 1976, A/RES/31/102

Resolution 32/147 of 16 December 1977, A/RES/32/147

Resolution 34/145 of 17 December 1979, A/RES/34/145

Resolution 36/109 of 10 December 1981, A/RES/36/109

Resolution 38/130 of 19 December 1983, A/RES/38/130

Resolution 40/61 of 9 December 1985, A/RES/40/61

Resolution 42/159 of 7 December 1987, A/RES/42/159

Resolution 44/29 of 4 December 1989, A/RES/44/29

Resolution 46/51 of 9 December 1991, A/RES/46/51

Resolution 48/122 of 20 December 1993, A/RES/48/122

Resolution 49/60 of 9 December 1994, A/RES/49/60

Resolution 49/185 of 23 December 1994, A/RES/49/185

Resolution 50/53 of 11 December 1995, A/RES/50/53

Resolution 50/186 of 22 December 1995, A/RES/50/186

Resolution 51/64 of 12 December 1996, A/RES/51/64

Resolution 51/210 of 17 December 1996, A/RES/51/210

Resolution 52/133 of 27 February 1998, A/RES/52/133

Resolution 52/165 of 19 January 1998, A/RES/52/165

Resolution 54/109 of 9 December 1999, A/RES/54/109

Resolution 54/110 of 2 February 2000, A/RES/54/110

Resolution 54/164 of 24 February 2000, A/RES/54/164

Resolution 55/2 of 8 September 2000, A/RES/55/2

Resolution 55/158 of 30 January 2001, A/RES/55/158

Resolution 56/24 of 29 November 2001, A/RES/56/24

Resolution 56/88 of 24 January 2002, A/RES/56/88

Resolution 56/160 of 13 February 2002, A/RES/56/160

Resolution 57/27 of 15 January 2003, A/RES/57/27

Resolution 57/219 of 27 February 2003, A/RES/57/219

Resolution 58/81 of 8 January 2004, A/RES/58/81

Resolution 58/136 of 22 December 2003, A/RES/58/136

Resolution 58/174 of 10 March 2004, A/RES/58/174

Resolution 58/187 of 22 March 2004, A/RES/58/187

Resolution 59/46 of 2 December 2004, A/RES/59/46

Resolution 92/92 of 12 December 1997, A/RES/52/92

Human Rights Committee

Article 6, CCPR General Comment 6 (1994)

Article 17, CCPR General Comment 6 (1988)

Concluding observations of the Human Rights Committee: Egypt, 31 October 2002, CCPR/CO/76/EGY

Concluding observations of the Human Rights Committee: Estonia, 31 March 2003, CCPR/CO/EST

Concluding observations of the Human Rights Committee: Moldova, 25 July 2002, CCPR/CO/75/MDA

Concluding observations of the Human Rights Committee: New Zealand, CCPR/A/44/40 (1989)

Concluding observations of the Human Rights Committee: New Zealand, 24 March 1995, CCPR/C/79/Add.47

Concluding observations of the Human Rights Committee: New Zealand, 17 July 2002, CCPR/CO/75/NZL

Concluding observations of the Human Rights Committee: United Kingdom, 29 October 2001, CCPR/CO/73/UK

Concluding observations of the Human Rights Committee: Yemen, 24 July 2002, CCPR/CO/75/YEM

Derogation of Rights (Art 4), CCPR General Comment 5 (1981)

Freedom of Expression (Art, 19), CCPR General Comment 10 (1983)

States of Emergency (article 4), CCPR General Comment 29 (2001)

International Law Commission

International Law Commission, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10), November 2001

Lauterpacht H, *Report of the Special Rapporteur on the Law of Treaties*, International Law Commission Report, A/2456 (A/8/9), 1953

Security Council

Counter-Terrorism Committee Chairman, *Threats to International Peace and Security Posed by Terrorism*, 18 January 2002, S/PV.4453, 5.

Resolution 286 of 9 September 1970, S/RES/286 (1970)

Resolution 1189 of 13 August 1998, S/RES/1189 (1998)

Resolution 1269 of 19 October 1999, S/RES/1269 (1999)

Resolution 1377 of 12 November 2001, S/RES/1377 (2001)

Resolution 1368 of 12 September 2001, S/RES/1368 (2001)

Resolution 1373 of 28 September 2001, S/RES/1373 (2001)

Resolution 1390 of 28 January 2002, S/RES/1390 (2002)

Resolution 1438 of 14 October 2002, S/RES/1438 (2002)

Resolution 1440 of 24 October 2002, S/RES/1440 (2002)

Resolution 1450 of 13 December 2002, S/RES/1450 (2002)

Resolution 1452 of 20 December 2002, S/RES/1452 (2002)

Resolution 1455 of 17 January 2003, S/RES/1455 (2003)

Resolution 1456 of 20 January 2003, S/RES/1456 (2003)

Resolution 1526 of 30 January 2004, S/RES/1526 (2004)

Resolution 1530 of 11 March 2004, S/RES/1530 (2004)

Resolution 1535 of 26 March 2004, S/RES/1536 (2004)

Resolution 1540 of 28 April 2004, S/RES/1540 (2004)

Resolution 1566 of 8 October 2004, S/RES/1566 (2004)

United Nations Secretariat

Report of the High-level Panel on Threats, Challenges and Change, Annex to the United Nations General Assembly's Fifty-ninth Session, Agenda item 55 of 2 December 2004, A/59/656

United Nations Secretary-General, *Annual Report to the United Nations General Assembly*, 56th General Assembly Meeting, GA/9914, 24 September 2001

OTHER INTERNATIONAL MATERIALS

Advisory Council of Jurists

Advisory Council of Jurists, *Reference on the Rule of Law in Combating Terrorism. Final Report*, (The Asia Pacific Forum of National Human Rights Institutions, 2004)

European Union

Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, (Council of Europe Publishing, 2002)

Parliamentary Assembly, Recommendation 1426 (1999), *European Democracies Facing up to Terrorism*, 23 September 1999

Organization for Economic Development and Cooperation

Financial Action Task Force on Money Laundering, *Guidance for Financial Institutions in Detecting Terrorist Financing*, 24 April 2002

Recommendations of the Council of the OECD Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data

Other Non-Governmental Organisations

Association for the Prevention of Torture, *APT Position Paper. Protection of the Human Rights and of Fundamental Freedoms in the Fight Against Terrorism*, URL <http://www.apr.ch/pub/library/ppter_en.htm> at 11 December 2003

Human Rights Watch Briefing Paper, *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, (Human Rights Watch, 2003)

Justice, *Response to the Joint Committee on Human Rights Inquiry into UK Derogations from Convention Rights*, (Justice, 2002)

NEW ZEALAND MATERIALS

Cabinet Office

Cabinet Office circular "Procedures for Regulations Made by Order in Council" of 13 December 1994 CO(94)17

Cabinet Office circular "Revised Procedures for Regulations Made by Order in Council" of 6 April 1995 CO(95)5

Controller and Auditor-General

Audit Office, *Report of the Controller and Auditor-General. Managing Threats to Domestic Security* (Wellington, 2003)

Crown Law Office

Letter from Crown Counsel to the Attorney-General, "Counter-Terrorism Bill PCO4663/14 Our Ref: nATT114/1124(15)", 10 December 2002

Letter from Crown Counsel to the Attorney-General, "Counter-Terrorism Bill PCO4663/14 Our Ref: nATT114/1124(15)", 11 February 2003